Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

KELLY M. O'GILVIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals in its decision in *O'Gilvie v. United States*, 95-2 USTC ¶50,508 (10th Cir. 1995), has interpreted a federal statute in a manner that unreasonably limits enforcement of legislative intent and unreasonably promotes governmental interest.

2. Whether a punitive damages award received in a suit involving physical injury is excludable from gross income as "any damages . . . received on account of personal injuries . . . ." 26 U.S.C. § 104(a)(2).

3. Whether the federal district court is required to strictly comply with Federal Rules of Civil Procedure in order to modify its judgments or has power independent of the Federal Rules to modify its judgment.

PARTIES BELOW

Parties below are Kelly M. O'Gilvie, Plaintiff-Appellant in case no. 94-3004, Cross-Appellee in case no. 94-3031. Kevin M. O'Gilvie and Stephanie L. O'Gilvie, Defendants-Appellees in case no. 94-3058; United States of America, Defendant-Appellee in case no. 94-3004, Cross-Appellant in case no. 94-3031, and Plaintiff-Appellant in case no. 94-3058.

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OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 95-2 USTC ¶50,508 (10th Cir. 1995), and is reprinted in the appendix at page 1. The decision of the District Court rendered on November 30, 1993 is reprinted in the appendix at pages 31 and 37, and the amended decision rendered on December 7, 1993 is reprinted in the appendix at page 38.

JURISDICTION

The Tenth Circuit issued its decision on September 19, 1995. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are listed below and are included in the appendix:

Section 61(a), 26 U.S.C. §61(a). Appendix at 49.

Section 213(b)(6) of Revenue Act of 1918. Appendix at 49.

Section 104(a)(2), 26 U.S.C. §104(a)(2) (1988). Appendix at 49.

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Federal Rules of Civil Procedure 60(a). Appendix at 44.

STATEMENT OF FACTS

In 1983, Betty O'Gilvie died of toxic shock syndrome. In 1988, her estate was awarded, in addition to other damages, $10 million in punitive damages against International Playtex, Inc. After payment of attorney's fees and expenses, the balance of the award was paid to Betty O'Gilvie's heirs at law,

her husband, Kelly O'Gilvie, and her children, Kevin O'Gilvie and Stephanie O'Gilvie. Kelly O'Gilvie, the petitioner in this application, and the children paid the taxes on the punitive damages and made proper administrative application for refund of those taxes based upon the I.R.C. §104(a)(2) exclusion. The request for refund was denied. Significantly, the IRS paid the children their refunds upon request. The refund of the children's taxes was recommended by the Commissioner of the Internal Revenue and was presented to the Joint Committee of the United States Congress on Taxation for approval.

In the Federal District Court of the District of Kansas, ~~Kelly~~ O'Gilvie sought a refund for taxes paid on the punitive damages award. Initially, the district court granted summary judgment in favor of the defendant on the issue of the taxability of punitive damages on May 26, 1992. (Appendix at 25.) On that same day, this Court issued its decision in *United States v. Burke*, 504 U.S. 229. Petitioner filed a motion for reconsideration, which the district court granted. **Judgment** was entered on August 26, 1992 in favor of the taxpayer, finding that I.R.C. §104(a)(2) exempted from taxation the award of punitive damages that taxpayer had received on account of physical injuries. (Appendix at 26 and 29.)

The decision that taxpayer's punitive damage award was exempt from taxation under I.R.C. §104(a)(2) was necessary to render justiciable a second issue of whether an "additional amount" of damages was taxable interest or additional punitive damages and, therefore, also exempt from tax. On October 27, 1992 the district court withdrew its order of August 26, 1992 on the issue of taxability of punitive damages stating:

> [I]t has been brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 . . . which has not been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.
>
> Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P, the judgment entered on August 26, 1992 is

> hereby withdrawn, ***subject to reinstatement at the conclusion of the case***. (Emphasis added.) (Appendix at 30.)

The second issue was briefed and the district court considered whether the "additional amount" was characterized as punitive damages, and, therefore, also exempt from tax under I.R.C. §104(a)(2). The district court entered **Judgment** on November 30, 1993 characterizing the "additional amount" as taxable interest and not as additional punitive damages. (Appendix at 37.) *The district court states in the introductory paragraph of the* ***Memorandum and Order*** *of November 30, 1993*:

> In a previous opinion, this court held O'Gilvie's punitive damages award was excludable from income tax pursuant to §104(a)(2) of the Internal Revenue Code.

Appendix at 31.

On December 7, 1993, the district court entered on its own initiative under Federal Rule of Civil Procedure 60(a), what the court entitled ***Amended*** **Judgment** which included the omitted portion of the November 30, 1993 **Judgment**. (Appendix at 39.) *No motion to amend or correct the judgment was made by either party at any time.* Defendant made no claim that the district court was without authority to amend the November 30, 1993 **Judgment** on its own initiative. Taxpayer filed timely notice of appeal on January 5, 1994 on the issue of the characterization of the "additional amount." Defendant filed its notice of appeal on February 1, 1994, more than sixty (60) days from the entry of judgment on November 30, 1993.

REASONS FOR GRANTING THE WRIT

(a) The United States Court of Appeals for the Tenth Circuit has expressed and applied a methodology of statutory construction which places an impermissible restriction upon the enforcement of Congressional legislative intent by requiring immediate recourse to a "default rule" in favor of the government upon a finding of intrinsic ambiguity in the words of the statute.

(b) The United States Court of Appeals for the Tenth Circuit has entered a decision in this case in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Horton v. Commissioner*, 33 F.3d 625 (1994), and with the United States Tax Court in *Commissioner v. Miller*, 93 TC 330 (1989); *Horton v. Commissioner*, 100 TC 93 (1993); *Downey v. Commissioner*, 97 TC 10 (1991); and *Robinson v. C.I.R.*, 1995 U.S. App. Lexis 33,759. Both this Court in *C.I.R. v. Schleier*, 515 U.S. ___, 115 S.Ct. 294, 95-1 USTC ¶50,309, and the Sixth Circuit in *Horton*, found the statute *unambiguous* and yet arrived at opposing conclusions about the meaning and results. This Court in *Burke* and the Tenth Circuit in *O'Gilvie* found the statute *ambiguous* and yet articulate different and mutually exclusive tests. The conflict between the circuit courts is not resolved by application of the principles of statutory interpretation described by this Court.

(c) The Tenth Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent of the meaning of the words of the Revenue Act of 1918 Section 213(b), the direct predecessor of I.R.C. §104(a)(2).

(d) The rationale underlying the decision of the Tenth Circuit is contrary to and overrules a long line of settled case law that has been relied upon by taxpayers, counsel, tax advisors, and the IRS to interpret I.R.C. §104(a)(2). Such rationale applies a "compensatory purpose" test rejected by those cases.

(e) The United States Court of Appeals for the Tenth Circuit has interpreted a federal statute, I.R.C. §104(a)(2), in such a manner that the 1989 Amendment to that statute is rendered meaningless.

(f) The Tenth Circuit has impermissibly expanded the power of the federal district court to modify its judgments beyond the authority granted by the Federal Rules of Civil Procedure.

DISCUSSION

(a) The United States Court of Appeals for the Tenth Circuit has expressed and applied a methodology of statutory construction which places an impermissible restriction upon the enforcement of Congressional legislative intent by requiring immediate recourse to a "default rule" in favor of the government upon a finding of intrinsic ambiguity in the words of the statute.

The duty of all federal courts is to discern the meaning intended by the enacting Congress in the words they wrote. When that intent is evident in the words of the statute, the meaning is plain. If those words are found to be ambiguous, the meaning is required to be interpreted by resorting to extrinsic facts. The courts have an obligation, consecrated by our constitution and common law, to give full voice to the Congressional acts if those acts are constitutional and within the power and authority of Congress. There has been no suggestion here that exemption of punitive damages from taxation is outside the constitutional power and authority of Congress.

Rigorous inquiry into the "intent of Congress" assures the full expression of the purposes of our government's legislative branch and full enforcement of that expression. Premature application of a "default rule" in favor of the government is a suppression of that Congressional intent. The Tenth Circuit found that the statute, I.R.C. §104(a)(2), is susceptible to two meanings and therefore must succumb to the "default rule." In doing so, the Tenth Circuit neglected a primary duty of the court, namely to interpret the intent from extrinsic evidence, if necessary, to give full expression to the acts of Congress. There is ample extrinsic evidence for such an interpretation of this statute. The Tenth Circuit did not find that interpreting the meaning of the statute was not possible, only that it was not necessary. The reality in *O'Gilvie* is that the intent of Congress is a tattered flag that the Tenth Circuit and those courts it follows do not feel obliged to salute.

This diminishment of the proper role of extrinsic evidence in the construction of congressional intent was first practiced in this context by the Fourth Circuit in *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). The Fourth Circuit begins its analysis thus:

> At the outset, we reject the conclusion of the Tax Court that the plain meaning of §104(a)(2) compels exclusion of punitive damages from gross income . . . . Instead, we find that §104(a)(2) is *ambiguous* as to which form of causation is intended by "on account of." (Emphasis added.)

Miller, 914 F.2d at 590.

In the next step of analysis, the error in the method of the Fourth Circuit is revealed:

> Given the inherent ambiguity of §104(a)(2), we must resort to extrinsic aid to interpretation. . . . First, as the Tax Court recognized, it is a well-recognized, even venerable, principle that exclusions to income are to be construed narrowly. . . . **Given that §104(a)(2)'s language is not plain, the principle is applicable and inclines us to adopt the Government's more restrictive view of what kinds of damages are excludable from gross income under the section.** (Emphasis added.)

Miller, 914 F.2d at 590.

The flaw is precisely this: The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that a *clear intent to exclude* is evidenced.

The Fourth Circuit continued its incomplete and flawed analysis by resorting to only one actual extrinsic aid to interpretation, and that one even forbidden by statute. The Fourth Circuit finds an underlying "compensatory purpose" mandated in the descriptive title and arrangement of §104(a)(2), notwithstanding the fact that such interpretation is expressly prohibited by the Code at §7806(b).

SEC. 7806. CONSTRUCTION OF TITLE

(b) Arrangement and Classification. – No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title, nor shall any table of contents . . . or similar . . . descriptive matter relating to the contents of this title be given any legal effect.

(Appendix at 40.)

In its determination that §104(a)(2) has an underlying "compensatory purpose," the Fourth Circuit failed to address the careful and considered determinations in *Threlkeld* and its progeny that awards are *not required* to be a return of capital or compensatory to be excluded under I.R.C. §104(a)(2). *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988); *Burke v. United States*, 504 U.S. 229, 112 S.Ct. 1867 (1992), 92-1 USTC ¶50,254; *C.I.R. v. Schleier*, 515 U.S. ___, 115 S.Ct. 294, 95-1 USTC ¶50,309. See also footnote 2 on page 21, *infra*.

The Fourth Circuit did not consider any other extrinsic aid to interpretation despite the abundance of extrinsic evidence which surrounds this statute. The Treasury Regulation §1.104-1(c), the long standing administrative practice of excluding punitive damages, and the extensive case law which reject the interpretation that the statute had an underlying "compensatory purpose" were all dismissed without a word. The conflicts between the decision of the Fourth Circuit and the decisions of the courts in *Burford v. United States*, 642 F.Supp. 635 (N.D. Ala. 1986) and *Thompson v. C.I.R.*, 866 F.2d 709 (4th Cir. 1989), were rationalized, not resolved. The Fourth Circuit states that " . . . the liquidated damages award served both a deterrent *and* compensatory purpose. . . . Although Alabama law 'labeled' wrongful death proceeds as 'punitive,' the *Burford* court's close inspection of Alabama law uncovered an Alabama case rejecting the precise argument advanced in [*Burford*] – that such damages are obtained for punitive rather compensatory purposes." *Miller*, 914 F.2d at 591. In *Miller*, the Fourth Circuit avoided addressing the

problem by simply saying that punitive damages aren't really punitive damages.

In short, meaning of the statute was not construed by the Fourth Circuit in *Miller*. See *Crane v. Commissioner*, 331 U.S. 1 (1947). The statute was improperly interpreted by premature application of a "default rule," and yet the incomplete and flawed analysis dominates the decisions in the Circuits. This domination of the Fourth Circuit's analysis has come as the result of the misunderstanding and confusion between the "principle of narrow construction of exclusions from income" and a "default rule." The "default rule" was actually used by the Fourth Circuit and imitated in the cases which follow it, including the Tenth Circuit in *O'Gilvie*. The "principle of narrow construction" is *not* a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of all extrinsic evidence and that a *clear intent to exclude* be evidenced. Courts have decided the words of the statute are *not* required to have plain meaning, but that the clear intent to exclude can be interpreted from extrinsic evidence. *Burke*, 112 S.Ct. 1867, and *Threlkeld*, 848 F.2d 81. An ambiguous statute *does not* trigger the "default rule." The words "any damages . . . received on account of personal injuries," can express that clear intent, whether by plain meaning or from interpretation of extrinsic evidence.

A "default rule" would be applicable if, and only if, all means of interpretation from extrinsic evidence had been exhausted. Application of a "default rule" would require an *affirmative finding* that no "intent" can be discerned. The finding in *O'Gilvie* would have to have been that no choice can be made between two competing interpretations based on extrinsic evidence. Premature application of a "default rule" before such a finding denies full expression and enforcement of the intent of Congress in that legislation. The clear and undeniable consequence of such a premature application of a "default rule" is the impermissible promotion of a finding in favor of the government even in instances where the elected Congresses intended otherwise.

Even after the Fourth Circuit's flawed decision in *Miller*, numerous other courts continued to follow the proper methodology. Some of these courts, upon finding that the statute was *unambiguous*, applied that plain meaning to exclude the income from taxation. *Pistillo v. C.I.R.*, 912 F.2d 145 (6th Cir. 1990); *Commissioner v. Miller*, 93 TC 330 (1989); *Downey v. Commissioner*, 97 TC 10 (1991); *United States v. Burke*, 929 F.2d 1119 (6th Cir. 1991); *O'Gilvie v. United States*, 92-2 USTC ¶50,567 (D. Kan. 1992); *Hawkins v. United States*, 93-1 USTC ¶50,208 (D. Ariz. 1993); *Horton v. Commissioner*, 100 TC 93 (1993); *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994); *McKay v. Commissioner*, 102 TC 16 (1994); and *Bennett v. United States*, 94-1 USTC ¶50,044. Other courts, upon finding that the words of the statute were *ambiguous*, applied a more complete analysis to interpret the comprehensive extrinsic facts attendant upon this statute. See *Burke*, 504 U.S. 229.

After this Court's decision in 1992 in *Burke*, the district court in *Rice v. United States*, 834 F.Supp. 1241 (E.D. Cal. 1993), in its confusion about the decisional law, made no attempt to interpret the statute but set directly to the task of applying two tests, one approved in *Burke*, the "nature of underlying claim" test, and the other the Fourth Circuit's "compensatory purpose" test. The *Rice* decision in 1993 was the first time a court derived two separate tests for §104(a)(2) from the same language. The application of two tests by the district court in *Rice* without analysis is of little significance in the determination of the meaning of the words. However, the lure of avoiding the problem of analysis by the handy expedient of using both tests was too powerful to resist. The Fifth Circuit in *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995), and the Ninth Circuit in *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994) applied two tests and found that, under the application of both tests, punitive damages were taxable. This court in *Schleier* avoids finding that an *unambiguous* statute has two distinct interpretations by denying that the Treasury Regulation is one interpretation of the statutory language. In *Schleier*, the Treasury Regulation is

demoted to an "additional requirement" merely imposed by the IRS. *Schleier*, 95-1 USTC ¶50,309 at 88,117.

Premature application of a "default rule" has fostered this illogical result. This Court must, as it did in *Crane*, *supra*, interpret the words of the statute from extrinsic evidence to determine which of two mutually exclusive and competing interpretations was intended by Congress.

(b) The United States Court of Appeals for the Tenth Circuit has entered a decision in this case in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in *Horton v. Commissioner*, 33 F.3d 625 (1994), and with the United States Tax Court in *Commissioner v. Miller*, 93 TC 330 (1989); *Horton v. Commissioner*, 100 TC 93 (1993); *Downey v. Commissioner*, 97 TC 10 (1991); and *Robinson v. C.I.R.*, 1995 U.S. App. Lexis 33,759.

The cases of *Horton* in the Sixth Circuit and *O'Gilvie* in the Tenth Circuit share two essential characteristics. In both, the nature of the underlying claim is uncontrovertedly a tort and there is physical injury; in *O'Gilvie* a death, and in *Horton*, damage to a residence. No other circuit has dealt with the question of an award of punitive damages in connection with a case involving physical injury in an action where the underlying claim is undeniably a tort. Despite these similarities, these two sister courts are unable to agree on the meaning or even a *method of construction* of the meaning of the eight words in I.R.C. §104(a)(2). Even after *Schleier*, the Tenth Circuit does not, because it cannot logically, follow the methodology of the *Schleier* decision.

The legal analysis of whether an award made under the federal antidiscrimination statute is excluded under I.R.C. §104(a)(2) as in *Burke*, 112 S.Ct. 1867, and *Schleier*, 95-1 USTC ¶50,309, in the narrow sense, is not applicable to the determination of whether awards are excludable when it is uncontested that a tort claim is the underlying claim as in *O'Gilvie*. The *Burke* and *Schleier* decisions do not address punitive damages awarded in a case which involves a physical

injury, but only whether ADEA damages are excluded. However, the circuit courts in *Horton* and *O'Gilvie* rely largely upon the analysis provided by those two cases.

The confusion of the Internal Revenue Service and the courts since 1984 about the status of the law regarding the application of I.R.C. §104(a)(2) to these facts is demonstrated in the history of the *O'Gilvie* case. In 1988, the taxpayer, Kelly O'Gilvie and his children, received an award of punitive damages from precisely the same source, the wrongful death claim awarded to the estate of their wife and mother. The taxes on the punitive damage award were paid by all parties and requests for refund were made. The IRS refused a refund to Kelly O'Gilvie while his children's refunds were submitted for approval to the Joint Committee on Taxation with the recommendation of the Commissioner that the refunds be approved. The children's refunds were approved and paid. Only upon discovery by the litigation arm of the IRS that the father's case was being litigated was a demand for return of the children's refunds made. The cases were joined for purposes of determination of the issue of excludability under I.R.C. §104(a)(2). Upon reconsideration after this Court's decision in *Burke*, the District Court for the District of Kansas found that this court's decision in *Burke* mandates that punitive damages are excluded under I.R.C. §104(a)(2). In our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. In light of *Burke*, we believe our focus was misplaced. The Supreme Court's opinion makes clear that the proper inquiry . . . is on the nature of the claim underlying the . . . award. *O'Gilvie*, appendix at 27.

The *source* of the confusion regarding the status of the law is demonstrated in the application of that case law by the Tenth Circuit. The Tenth Circuit overruled the District Court decision finding that I.R.C. §104(a)(2) is susceptible to at least two different meanings, and is, therefore, *ambiguous*. **The Tenth Circuit specifically holds that the only requirement in the face of ambiguity is to construe the provision strictly in favor of the government.** This line of reasoning

on its face is appealing in its simplicity and directness. Unfortunately, the methodology beneath the Tenth Circuit's analysis is flawed and hazardous. It is this flaw in method which is the source of great confusion.

The Tenth Circuit in *O'Gilvie*, the Fourth Circuit in *Miller*, the Federal Circuit in *Reese*, the Fifth Circuit in *Wesson*, and this Court in *Schleier* have found the "default rule" controlling. If the statute is unambiguous, there is no need to resort to a "default rule." If the statute is ambiguous, construction by resort to extrinsic evidence is required and a "default rule" has no function. Only upon an affirmative finding that the meaning of the statute cannot be interpreted, can a "default rule" be brought to bear upon the question.

The holdings of the circuit courts whose method of analysis the Tenth Circuit follows are summarized below:

> Four Circuits have held that noncompensatory punitive damages are not received "on account of" personal injuries; therefore they are not excludable from gross income under §104(a)(2). See *Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). **These decisions begin with the threshold determination that the language of §104(a)(2), that gross income does not include "the amount of any damages received . . . on account of personal injuries," is *ambiguous*.** (Emphasis added). They then interpret the statute and determine that Congress intended to exclude only damages awarded to compensate for tort-like injury, relying on some or all of the following: (1) the statutory context and title, (2) the principle that exclusions from income should be construed narrowly, (3) the policy and legislative history of §104, (4) a Treasury Revenue Ruling *(sic)* addressing this issue, (5) the 1989 Amendment to §104(a)(2), and (6) Supreme Court cases discussing §104(a)(2) in other contexts. Because punitive damages (generally) are not

> intended to compensate, but to deter and punish, these circuits concluded that §104(a)(2) does not exclude punitive damages from income.

O'Gilvie, 95-2 USTC ¶50,508 at 89,638.

In the first step in its decision-making process, the Tenth Circuit finds the statute *ambiguous*:

> Neither the *Burke* nor the *Schleier* Court addressed the question whether the phrase in §104(a)(2) "on account of" personal injuries is ambiguous. With respect to this [question of ambiguity] we agree with the four circuits that have found it is susceptible of at least two meanings.

O'Gilvie, 95-2 USTC ¶50,508 at 89,639. Upon the finding of ambiguity, the Tenth Circuit then employs the appealing but defective method of immediate reliance upon a "default rule" to the exclusion of all else:

> In sum, it is not clear whether Congress intended to exclude punitive damages from income under §104(a)(2). *Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed.* (Emphasis added.)

O'Gilvie, 95-2 USTC ¶50,508 at 89,641.

The confusion is hopelessly compounded by the fact that this Court found the statute *ambiguous* in *Burke*, but found the same language *plain* in *Schleier*. Notwithstanding the statement by the Tenth Circuit in *O'Gilvie* that "[n]either the *Burke* nor the *Schleier* court address the question of ambiguity," this Court in *Schleier* is very resolute that the meaning of the statute is plain and unambiguous. In at least four different instances in the decision, this Court makes that declaration: "In our view, **the plain language of the statute** undermines the respondent's contention," *Schleier*, 95-1 USTC ¶50,309 at 2,163. "In contrast, no part of respondent's ADEA settlement is excludable under the **plain language of §104(a)(2),**" *Id.* at 2,164. "Respondent seeks to circumvent the **plain language of §104(a)(2)** by relying on the Commissioner's regulation interpreting that section," *Id.* at 2,165. "In

sum, the **plain language of §104(a)(2)**, the text of the applicable regulation and our decision in *Burke* establish two independent requirements that a taxpayer must meet before a recovery may be excluded under §104(a)(2)." *Id.* at 2,167.

This Court in *Schleier* makes absolutely no effort to interpret the statute from extrinsic evidence but relies upon the *plain language* for the meaning. However, the court places great emphasis upon the "default rule."

> We have also emphasized the corollary to §61(a)'s broad construction, namely, the "default rule" of statutory construction that exclusions from income must be narrowly construed.

Id. at 2,163. It is from that platform of an *unambiguous* statute that this court in *Schleier* proceeds to apply that "plain meaning" *as the court understands it* without resort to interpretation. *Id.* at 2,172. This threshold determination in *Schleier* of an *unambiguous* statute is contrary to the holdings in the cases upon which the Tenth Circuit relies. As the Tenth Circuit states in the passages quoted above, the Circuit Courts in *Miller*, *Hawkins*, *Wesson*, and *Reese* found the statute *ambiguous*.

Only the Court of Claims in *Reese v. United States*, 94-1 USTC ¶50,232 (Fed. Claims 1994), found the statute *unambiguous* and determined, as this Court did in *Schleier*, that the plain and unambiguous meaning clearly prohibited the exclusion to punitive damages. The Circuit Court of Appeals for the Federal Circuit *affirmed* the holding that the damage award was not excluded, however, the Federal Circuit *firmly reversed* the Court of Claims in regard to the finding of ambiguity. "The language 'on account of' is not free of ambiguity; rather, it is susceptible of at least two conflicting interpretations," *Reese*, 24 F.3d at 230. The Federal Circuit then applied the "default rule."

There are other courts which have found, as this Court did in *Schleier*, that this statute is *unambiguous*. Each of those courts, however, arrived at quite a different result from that finding of an unambiguous statute. In *Burford v. United States*, 642 F.Supp. 635 (N.D. Ala. 1986); *Horton v. Commissioner*, 100 TC 93 (1993); *Horton v. Commissioner*, 33 F.3d 625 (6th Cir. 1994); *O'Gilvie v. United States*, 92-2 USTC

¶50,567 (D. Kan. 1992); *Hawkins v. United States*, 93-1 USTC ¶50,208 (D. Ariz. 1993); and *Commissioner v. Miller*, 93 TC 330 (1989), each of the courts applied the "plain meaning" to hold that the punitive damage, or liquidated damage award is excluded by §104(a)(2).

While both the Sixth Circuit and the Tax Court in *Horton* agree with this Court in *Schleier* that the meaning is *plain*, the decisions are contradictory. The Sixth Circuit applied the *plain meaning* of the statute to exclude from taxation all damages that flow from a tort claim for personal injury, including punitive damages. This Court in *Schleier* applied the *plain meaning* to tax punitive damages. This Court in *Burke* found the meaning of the words of the statute *ambiguous* and susceptible to interpretation by various methods of statutory construction and determined that the interpretation expressed in the Treasury Regulation §1.104-1(c) was intended. See *Burke*, *id.* at 1,870, and *Schleier*, *id.* at 2,172.

Although the facts and the question were virtually identical in *Burke* and *Schleier*, in *Burke* this Court did not mention two interpretations or tests from the same words. In *Burke*, this Court gave approval to the *interpretation* expressed in the Treasury Regulation as the valid interpretation of the statute's meaning. *Burke*, 115 S.Ct. at 2166. In *Schleier*, the Treasury Regulation has lost it status as a valid interpretation and been relegated to the position of a requirement "in addition to" the statutory requirement.

In summary, this Court in *Burke* found the meaning of the statute *ambiguous* and susceptible to interpretation by various methods to determine whether damages awarded in Title VII suit and §104(a)(2) are excluded. *Burke* adopted the interpretation expressed in the Treasury Regulation. The Sixth Circuit in *Horton* found the statute *plain* but followed the test approved in *Burke* that "the necessary inquiry is into the nature of the underlying claim and that is the beginning and end of the inquiry." *Burke*, 112 S.Ct. at 1869, 1872. The Ninth Circuit in *Hawkins* found the meaning *ambiguous* and applied both meanings. This court in *Schleier* found the meaning of the statute *plain* and applied the two competing tests

simultaneously. No consistent methodology can be derived from this case law and no logical results achieved.

(c) The Tenth Circuit has entered a decision that is in clear conflict with the enacting Congress' original intent of the meaning of the words of the Revenue Act of 1918 Section 213(b), the direct predecessor of I.R.C. §104(a)(2).

The Sixty-fifth Congress wrote the words of section 213(b) of the Revenue Act of 1918 to exclude those amounts it believed were not within the definition of gross income. The Tenth Circuit quotes the legislative history which specifically indicates that the bill which was enacted as section 213(b) provides that such amounts *shall* be excluded from gross income:

> Under present law it is doubtful whether amounts received throughout accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. *The proposed bill provides that such amounts shall not be included in gross income.* (Emphasis added.) H.R. Rep. No. 767, 65th Cong.2d Sess. 9-10 (1918) (Quoted in *Reese*, 24 F.3d at 233).

O'Gilvie, 95-2 USTC ¶50,508 at 89,639. This doubt whether such amounts were required to be included in gross extended to punitive damages as well. *Glenshaw Glass*, 348 U.S. 426, 75 S.Ct. 473, 211 F.2d 928 (1955).

The words of Section 213(b) were clear and fulfill the intention to exclude any and all damages as expressed in the statute and explained in the Committee Report above. Now, the courts have vitiated the original intent of the enacting Congress by the finding that the enacting Congress was under a mistaken belief about the law. These courts which adopt the *revised* intent theory find that the words, "any damages . . . received on account of personal injury," do not now mean what the Congressmen who wrote them thought they meant. This approach to interpreting "original intent" is

untenable. A "mistake" of law or a change in the understanding of the law that occurred more than 36 years after the enactment did not alter or revise that original intent.

The proper inquiry is, "*What did the original enactors intend* ***those words*** to mean?" *Those words* at that time were *intended* by the Sixty-fifth Congress to exclude all damages. Perhaps, Congress wrote those words *because* they did not believe those awards were includable in gross income. But there can be no doubt that, at that time, those words were written to exclude all damages awarded in personal injury cases.

Congressmen of that Sixty-fifth Congress, if asked in 1919 what was intended by those words, would have answered, "The words exclude any and all damages, including punitive damages." If the judges and Justices making the decision were taken back to 1920, nearer to the time of enactment, and asked the question they are being asked today, "What do these words mean?" they would find, as a matter of law, that any and all damages are excluded by the words of the statute, including punitive damages. This was the IRS' original understanding of the statute. *Burke*, 112 S.Ct. at 1,875.

The decision of later courts do not reform "original intent," yet courts have cited *Glenshaw Glass*, *supra*, as support for the proposition that §104(a)(2) does not exclude punitive damages. *Glenshaw Glass* does not mandate taxation of all punitive damages in all events. The genius of *Glenshaw Glass* is that punitive damages are income and, *unless otherwise specifically excluded*, taxable. In the express words of this Court in *Glenshaw Glass*, some exclusion of punitive damages is anticipated. It is *this exclusion*, in what is now §104(a)(2), that is anticipated, for there is no other exclusion of punitive damages found in the Internal Revenue Code. *Glenshaw Glass* does not obviate or transform the "original intent" of the enacting Congress. *Glenshaw Glass* anticipates and confirms a specific exclusion for these punitive damages.

After the *Glenshaw Glass* decision in 1955, the Internal Revenue Service, Congress, and the courts continued to approve the original codification which excluded all damages.

Exclusion of punitive damages recovered in personal injury claims under I.R.C. §104(a)(2) was an established administrative practice of the IRS for 66 years from the enactment of section 213(b) in 1918 until 1984. (See Rev. Rul. 58-578, 1958-2 C.B. 38; Rev. Rul. 75-45, 1975-1 C.B. 47; Gen. Couns. Mem. 35,967 (August 27, 1974); Priv. Ltr. Rul. 7304120600A (April 12, 1973).)[1] This long-standing established administrative practice describes the meaning of the statute. These administrative statements came after 1955 when the IRS was well aware of the significance of *Glenshaw Glass*.

In 1956, the administrative practice was formally adopted as Treasury Regulation §1.104-1(c) which expresses the necessity of the inquiry into the "nature of the underlying claim." *Burke*, 112 S.Ct. at 1,870; 1,875; and 1,878. The authority of a Treasury Regulation is a great deal more significant than that of a Revenue Ruling. Treasury Regulation §601-601(a). One significant factor in weighing the authority of this regulation is the length of time it has been in effect. This Regulation had been in effect for 28 years before Rev. Rul. 84-108, 1984-2 C.B. 32 was promulgated. Until after this Court's decision in *Burke* in 1992, neither the IRS nor any court had postulated that the statute created two tests. Treasury Regulation §1.104-1(c) is the expression of one interpretation, long recognized as the only interpretation.

The government adhered to the "original intent" of the statute and 19 years after *Glenshaw Glass* described the plain meaning and the established administrative practice in General Counsel Memorandum 35,967 (August 27, 1974):

> . . . I.R.C. §104(a)(2) is a specific statutory exclusion from gross income within the "except as otherwise provided" clause of I.R.C. §61(a). . . . Therefore, under I.R.C. §104(a)(2), *any damages, whether compensatory or punitive and whether a*

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[1] The General Counsel memorandum and the Private Letter Ruling are not cited nor relied upon as precedent. I.R.C. § 6110(j)(3). Both documents, however, are competent evidence of administrative practice. *Rowan Cos. v. United States*, 452 U.S. 247, 261 n.17, 68 L.Ed.2d 814, 826 n.17 (1981).

> *substitute for income or not*, received on account of personal injury or sickness are excludable from gross income. . . . *There is nothing in the legislative history of I.R.C. §104, or the regulations thereunder indicating that punitive damages awarded in connection with personal injuries should be includable in gross income.*

Twenty years **after** the decision in *Glenshaw Glass*, the Commissioner of the Internal Revenue continued to adhere to the established meaning of the statute in Revenue Ruling 75-45:

> Therefore, under §104(a)(2) any damages, whether compensatory or punitive, received on account of personal injuries or sickness are excludable from gross income.

Rev. Rul. 75-45, 1975-1 C.B. 47. These official statements by the IRS, Treasury Regulation §1.104-1(c), the General Council's Memorandum, *supra*, and Rev. Rule 75-45, define the meaning of the statute at a time closer to its enactment, and evidence a continued adherence to the understood and established interpretation.

The enactor's original intent cannot be reformed administratively by a change in the law 36 years after the enactment. However, the actions and acquiesces of subsequent Congresses, especially in the wake of the significant change in the law brought about by *Glenshaw Glass*, are properly regarded as the intent of those Congresses. (See *Crane*, *supra*, and *Burke*, *supra*.) Section 104(a) here has been re-enacted without material change repeatedly throughout the years. Reenactment and amendment to the statute without change is the most authoritative evidence of Congressional approval of the long standing administrative interpretation of the statute as excluding punitive damages. *Eli Lilly v. EPA*, 615 F.Supp. 811 (S.D. Ind. 1985); *Massachusetts Mutual. Life Ins. Co. v. United States*, 5 Cl.Ct. 581 (1984); and *Crane v. Commissioner*, 331 U.S. 1 (1947).

From the time of the original enactment of §213(b)(6) in 1918 until the publication of Revenue Ruling 84-108 in 1984, 66 years passed during which the statutory provision was not

altered with the *enactment* of nine subsequent Revenue Acts. I.R.C. §104, *with the relevant language unchanged*, was adopted into the 1939 and 1954 Codes. The Treasury Regulation §1.104-1(c), which pertains precisely to this provision, was adopted in 1956, and approved by Congress by those *re-enactments*.

Congress *amended* §104 three times in the nine years following the publication of Rev. Rul. 75-45. (See Pub.L.No. 94-455, §505(e), 1901(a)(17) (adding a new subsection to §(a)); Pub.L.No. 96-465, §2206(e)(1) (giving effect to the Foreign Service Act of 1980); and Pub.L.No. 97-473, §101(a) (enlarging the scope of subsection (a)(2) by adding to that exclusion what would otherwise be the taxable interest component of "structured settlements").) Although the very subsection at issue was amended after the publication of Rev. Rul. 75-45 and *attention to the interpretation of the exclusion was necessary*, Congress did not change the pertinent holding of the Rev. Rul. 75-45 in any one of these amendments. The exclusion of punitive damages was a prior long-standing and consistent administrative practice embodied in the holding of Rev. Rul. 75-45 and in Treasury Regulation §1.104-1(c).

In 1989, Congress once again considered §104(a)(2) and *acted* to limit the exclusion of punitive damages to awards in connection with physical injury or physical sickness only. This Court in *Burke* acknowledged and validated that change in 1992. *Burke*, 112 S.Ct. at 1871 note 6, and 1876 note 3 (Scalia concurring). However, in 1995, the Tenth Circuit joined the Ninth Circuit in its opinion that Congress did not know what it was doing when it enacted the Amendment to §104(a)(2). The Ninth Circuit in *Hawkins* asserted " . . . the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Hawkins*, 30 F.3d at 1,082. The corollary to that principle is even more apt. *The view of a subsequent Commissioner involved in controversial litigation forms an even more hazardous basis for inferring the intent of an earlier Congress.* In 1984, the Commissioner, without impetus from court decision, congressional act, or other relevant source, changed his position on the exclusion of punitive damages in Rev. Rul. 84-108. The Sixth Circuit in

Threlkeld, supra, addressed the litigation position of the IRS in the related Rev. Rul. 85-143.

> We note that in Revenue Ruling 85-143 the Commissioner has announced that it will not follow the Ninth Circuit's decision in *Roemer*. A Revenue Ruling, however, is not entitled to the deference accorded a statute or a Treasury Regulation. *Brook, Inc. v. Commissioner*, 86-2 USTC ¶9646, 799 F.2d 833, 836 n.4 (2nd Cir. 1986). Courts may disregard a Revenue Ruling if it conflicts with the statute it supposedly interprets or with that statute's legislative history or if it is otherwise unreasonable. *Id.* In our opinion, Revenue Ruling 85-143 makes an unreasonable distinction between injury to personal reputation and injury to professional reputation. Therefore we refuse to follow it.

Threlkeld, 88-1 USTC ¶9370 at 83,992. In view of the long standing administrative practice, the plain language of the statute, and the contemporaneous statements of intention by the enacting Congress, the change in 1985 by the Commissioner is an unwarranted administrative legislation. *Burford*, 642 F.Supp. 635.

The actions of the many Congresses, including the Congress which amended the statute in 1989, must weigh heavily in the determination of the meaning of the statute. The Tenth Circuit has gravely misplaced its allegiance when it gives greater weight to the litigation position of the IRS than to the continuing acts and acquiesces of the governmental body charged with making the laws.

Can the intent change after enactment? If no, then the *original intent* of the enacting Congress, although based on an incorrect legal fact, is still that *any and all* those damages are excluded. If the meaning evolves, then the intention of the subsequent Congresses, including the Congress which enacted the 1989 Amendment, is of greatest relevance to the inquiry and not to be summarily dismissed. Cf. *Hawkins, supra*.

As the Tenth Circuit has noted, courts have not applied the revised "original intent" to prohibit exclusion of the awards for damages such as lost wages, business losses, or

losses as the result of injury to personal and business reputation, notwithstanding the fact that these awards are now known to be "otherwise taxable" as well.

> this rational [of an underlying compensatory purpose] is somewhat problematic. If . . . a plaintiff recovers for wages lost due to his being injured in an accident, that amount would be excludable from gross income under §104(a)(2), and thus not taxable. But if he had actually worked his wages would be reportable income subject to taxes; thus the §104(a)(2) exclusion has made him more than whole.

O'Gilvie, 95-2 USTC ¶50,508 at 89,640.

That meaning "intended" by Congress in 1918 of those written words which expressly exclude any damages, including punitive damages, cannot be reformed to exclude only those awards which are compensatory.

(d) The rationale underlying the decision of the Tenth Circuit is contrary to and overrules a long line of settled case law that has been relied upon by taxpayers, counsel, tax advisors, and the IRS to interpret I.R.C. §104(a)(2). Such rationale applies the "compensatory purpose" test rejected by those cases.

The case law has been sparse regarding the exclusion of punitive damages awarded in actual physical injury cases. *Burford*, *supra*, *Horton*, *supra*, and *O'Gilvie*, *supra*. However, the case law with respect to the interpretation of the eight words of I.R.C. §104(a)(2) at issue here has been voluminous. (See *Summary of Cases*, appendix at 51-53.) And, until *Miller*, *supra*, the courts had consistently rejected the "compensatory purpose" test and the "return of capital" rationale.

The IRS first argued in 1972 that only awards which were in the nature of a *return of capital* were excludable. These taxpayers were asking that lost wages awarded because of their personal injuries be excluded from income under §104(a)(2). The IRS argued that the award for lost wages was made to compensate for the economic loss and not as direct

compensation for the personal injury. The courts repeatedly rejected the interpretation that §104(a)(2) prohibited the exclusion because of the *type* of damages and further rejected the proposition that exclusion under §104(a)(2) is limited to damages which are compensatory or are a *return of capital*.[2] **In no reported decision has the fact that an award for lost wages or economic losses is not a return of capital prevented exclusion under §104(a)(2) where the underlying claim was for personal injury.** These courts note that, without a specific exclusion, these items would be taxable but consistently find that §104(a)(2) provides the required specific exclusion. Under the weight of these cases, which hold awards of lost profit and wages excludable, although those awards are ***not a return of capital***, the assertion that the statute has an underlying "compensatory" purpose is insupportable.

The next spate of cases came as the result of the IRS seeking to limit the *type* of award excluded to only awards for *physical* injury. The IRS asked the courts to read the "on account of personal injury" portion of the eight word phrase to mean "on account of *physical* injuries" only. *Roemer v. Commissioner*, 716 F.2d 693 (9th Cir. 1983); and *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988). Thus the IRS argued that the exclusion was not available for economic loss, such as loss to reputation, etc., because the injury was not physical. *Wolfson v. C.I.R.*, 651 F.2d 1228 (6th Cir. 1981); *Church v. C.I.R.*, 80 TC 1104 (1983); *Roemer, supra*. These attempts to limit the *type* of damages excluded by the words "on account of personal injury" were rejected. These courts rejected the

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[2] *Seay*, 58 TC 32 (1972); *Wolfson*, 651 F.2d 1228 (6th Cir. 1981); *Church*, 80 TC 1104 (1983); *Roemer*, 716 F.2d 693 (9th Cir. 1983); *Threlkeld*, 848 F.2d 81 (1988); *Metzger*, 88 TC 46 (1988); *Bent*, 835 F.2d 67 (3rd Cir. 1987); *Wulf*, 883 F.2d 842 (10th Cir. 1989); *Thompson*, 866 F.2d 709 (4th Cir. 1989); *Byrne*, 883 F.2d 211 (3rd Cir. 1989); *Rickel*, 900 F.2d 655 (3rd Cir. 1990); *Redfield*, 940 F.2d 542 (9th Cir. 1991); *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Downey*, 97 TC 10 (1991); *Burke*, 929 F.2d 1119 (6th Cir. 1991); *Rice*, 834 F.Supp. 1241 (E.D. Cal. 1993); *McKay*, 102 TC 16 (1994); *Bennett*, 94-1 USTC ¶50,044 (1994).

"compensatory purpose" test which limited the *type of damages* excluded, and uniformly held that once the "underlying claim" for personal injury was found, then *all* damages which flowed from that claim are excludable. The statute was consistently interpreted to apply only the "nature of the underlying claim" test as the beginning and the end of the inquiry. *Burke, supra, Threlkeld, supra, Horton, supra.*

Before the IRS had *lost* the battle to limit the exclusion under §104(a)(2) for damages awarded for non-physical injury, and for wages, business and profit losses, the IRS, as a part of its litigation initiative, brought its administrative statements regarding punitive and physical damages in line with its litigation position in Rev. Rul. 84-108 and Rev. Rul. 85-143, legislating that the exclusion was limited by the *type* of damage received. Even then, the IRS did not suggest the idea that the test for excludability in §104(a)(2) was a dual test. Thus began yet another round of controversy regarding limiting the *type* of damages which would be excluded under §104(a)(2). In 1988, Rev. Rul. 85-143 was rejected by *Threlkeld*. "In our opinion, Revenue Ruling 85-143 makes an unreasonable distinction between injury to personal reputation and injury to professional reputation. Therefore, we refuse to follow it." *Threlkeld, supra.* (Also see discussion at 21, *supra.*)

Just as the decision in *Burke* was beginning to narrow the areas of uncertainty, the comments in *Schleier* regarding application of a "compensatory purpose" test have turned settled areas to quicksand. The application of a "compensatory purpose" test with its "return of capital" rationale in *Schleier* indicates that the lower court decisions in all the preceding cases where the IRS argued for application of the "compensatory purpose" test have been wrongly decided. In each case, those courts determined that there was only one test and that test was the "nature of the underlying claim" test. See footnote 2, *supra*, at 23. To limit the exclusion by the *type of award* that flows from the injury is a stark rejection of all prior case law which had litigated the issue of interpretation of the test that the eight words expressed.

(e) The United States Court of Appeals for the Tenth Circuit has interpreted a federal statute, I.R.C. §104(a)(2), in such a manner that the 1989 amendment to that statute is rendered meaningless.

The inescapable conclusion of the Tenth Circuit's decision in *O'Gilvie*, *supra*, is that §104(a)(2) exempts no punitive damages at any time. Thus the statute, as amended, is void on its face as to exclusion of punitive damages. However, it is evident from the text of the amendment that Congress believed that the statute exempts not only *non-physical damages* received on account of personal injuries, but also exempts *punitive damages* received on account of personal injuries. Section 104(a) as amended states in relevant part:

> Gross income does not include – (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness. . . . Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

Taxpayers and their advisers are understandably bewildered and misled by the language of the statute. The taxpayers who follow, in good faith, the directions of the text of the statute or the case law of the Sixth Circuit, will be subject to various reporting and underpayment penalties if the Tenth Circuit is correct.

The Tenth Circuit focuses on the conflict:

> We are further troubled by the language of the 1989 Amendment to §104(a)(2), effective after the instant case was brought, but surely bearing upon the question of congressional intent. . . . The taxpayers contend that this amendment . . . narrowing language, compels the conclusion that punitive damages were excludable under §104(a)(2) before the amendment. . . . The clear implication of Congress' phraseology is that punitive damages in a case involving physical injury or physical sickness are excludable, and were excludable. . . .

O'Gilvie, 95-2 USTC ¶50,508 at 89,640.

In *Hawkins*, Judge Trott dissenting on a panel of three describes the problem:

> [I]f, as the Ninth Circuit majority opinion suggested, punitive damages were taxable both before and after the 1989 Amendment, then the Amendment was meaningless since punitive damages were already taxable, unless the amendment broadened the exclusion, which was untenable. . . . By contrast, the majority is unable to offer a satisfactory explanation of the 1989 Amendment. The majority suggests that *all* punitive damages, both before and after 1989, must be taxable. . . . Unfortunately, this conclusion means that Congress' 1989 Amendment to §104 had no effect because punitive damages were already taxable! Moreover, if Congress wanted to clarify that all punitive damages were taxable, why did the amendment create a distinction between physical and nonphysical injury cases?

Hawkins, 30 F.3d at 1086-87.

This *O'Gilvie* case supplies the first instance in which punitive damages for physical injury were found not to be excluded and the amendment to the statute is directly shown to be meaningless. In *Hawkins*, 30 F.3d 1077, the punitive damages award was made for breach of good faith, not for physical injury. In *Reese*, 24 F.3d 228, the punitive damages award was for sexual harassment, not physical injury. Only in *O'Gilvie* were punitive damages awarded because of a physical injury and *O'Gilvie* is the only physical injury case which prohibits the exclusion to the taxpayers. The other physical injury cases, *Burford* and *Horton*, are in accord with the express meaning of the 1989 Amendment. The amendment to the statute limits the exclusion under §104(a)(2) to only punitive damages awarded in connection with physical injury. If the Tenth Circuit is followed, those punitive damages were not excluded anyway and the amendment is inoperative and invalid.

The Tenth Circuit does not resolve the "troubling" issue of the 1989 Amendment but, in effect, states that Congress didn't know what it was doing.

> It is apparent to us that when Congress was debating the amendment it believed that §104(a)(2) applied to punitive as well as compensatory damages . . . even if that was what Congress believed, it does not "indicate that Congress gleaned the true intent of previous Congresses, only that Congress was aware that courts had recently so interpreted the section." *Hawkins*, 30 F.3d at 1082 n.6.

O'Gilvie, 95-2 USTC ¶50,508 at 89,640.

A better reasoned interpretation of §104(a)(2) and one that comports with Congressional intent is that punitive damages received in actions for both physical and non-physical injuries prior to the 1989 Amendment were excluded under paragraph (2) of I.R.C. §104(a) and the Amendment limited that exclusion to punitive damages awarded in cases involving physical injury or physical sickness only.

In *Burke*, this Court acknowledges the Amendment and affirms its meaning by direct reference to its provisions.

Justice Blackmun states:

> Congress' 1989 Amendment to §104(a)(2) provides further support for the notion that "personal injuries" includes physical as well as nonphysical injuries. Congress rejected a bill that would have limited the §104(a)(2) exclusion to cases involving "physical injury or physical sickness,". . . . At the same time, Congress amended §104(a) to allow the exclusion of *punitive* damages only in cases involving "physical injury or physical sickness."

Burke, 112 S.Ct. at note 6, page 1871. *See also Burke*, 112 S.Ct. 1876, note 3.

The apparent exclusion from taxation on the face of §104(a)(2) is deeply confusing. So long as the case law is not directly on point and the statute is open to "interpretation," the advice given to taxpayers and the reporting of the punitive damages will vary from jurisdiction to jurisdiction and from IRS office to IRS office. In view of the conflict in the circuits, it is incumbent upon the judiciary to clarify this gross contradiction that the case law makes of the statute.

(f) The Tenth Circuit has impermissibly expanded the power of the federal district court to modify its judgments beyond the authority granted by the Federal Rules of Civil Procedure.

There is no doubt that the government was entitled to the extended period of sixty (60) days under F.R.C.P. 4(a) in which to file its notice of appeal. However, the judgment from which it appealed was filed on November 30, 1993, and was amended under Rule 60(a) on December 7, 1993. Amendment of a judgment under F.R.C.P. 60(a) does not toll the time for filing the notice of appeal. The Tenth Circuit states without analysis or reference to statutory authority that the government's cross appeal is filed timely. *O'Gilvie*, 95-2 USTC ¶50,508. (Appendix at 8.) Under no analysis is the Tenth Circuit correct in its holding.

Two questions had to be answered to determine jurisdiction. First, under what authority did the district court make its December 7, 1993 "amendment" to the judgment entered on November 30, 1993? Second, was the time for filing notice of appeal tolled under this authority?

The Federal Rules of Civil Procedure authorize the correction or amendment of a judgment in only certain instances: Rules 52, 59(e), 60(a), and 60(b). (Appendix at 41, 43, and 44.) Rules 52, 59(e) and 60(b) require a motion by a party to amend a judgment. Rule 60(a) corrections may be made upon motion, but motion of a party is not required. *Only Rule 60(a)* authorizes the correction of judgment on the Court's own initiative. Such is the case here. In fact, the only errors in a judgment which a district court *may* correct of its own initiative are those errors arising from clerical mistakes and from oversight or omission as sanctioned by Rule 60(a). The Court's omission in this case of the previously withdrawn decision is the precise type of oversight or omission contemplated by Rule 60(a).

All parties were on prior notice of the decision of the court on that omitted portion of the November 30, 1993 decision. The court had issued **Judgment** on August 26, 1992 concerning the first issue which was withdrawn "subject to

reinstatement at the conclusion of the case" on October 27, 1992. (Appendix at 30.) The **Memorandum and Order** filed on November 30, 1993 expressly stated in its introductory paragraph the result and holding of its clerical omission:

> . . . In a previous opinion, this court held O'Gilvie's punitive damages award was excludable from income tax pursuant to §104(a)(2) of the Internal Revenue Code.

(Appendix at 31.) There was no doubt in anyone's mind that the district court had made a clerical error. Nor was there any doubt concerning the substance of the court's decision.

The decision in the November 30, 1993 **Judgment** was *absolutely dependent* upon the outcome of the first. The first determination, that punitive damages were excluded, was essential to the determination of the second issue of whether the "additional amount" was an additional punitive damage award and, therefore, also exempt from tax under I.R.C. §104(a)(2). If the punitive damage award was taxable, then the "additional amount" would have been taxable in all events whether characterized as interest or additional punitive damage award. The parties were well aware that the decision in favor of the taxpayer on the first summary judgment issue of taxability of punitive damages was essential to the justiciability of the second summary judgment issue. The court's correction to include the omitted portion did not change the decision, but clarified what was understood by all parties to be what the court intended to say. *Blanton v. Anzolone*, 7 Fed. Rules Serv. 3rd 1461, 813 Fed. 1574 (9th Cir. 1987).

Rule 60(a) makes no provision for tolling the period of time for parties to file appeals because of the court's correction. *Miller v. Transamerican Press, Inc.*, 37 Fed. Rules Serv. 2d 850, 709 F.2d 524 (9th Cir. 1983). The district court corrected its omission on December 7, 1993 before either appeal was docketed in the appellate court. Leave of the appellate court to correct the omission was not required.

The defendant's notice of appeal, filed on February 1, 1994, was filed more than sixty days from the date of final judgment on November 30, 1993. The court, on its own initiative under the authority of Rule 60(a), clarified what was

understood by all parties to be what the court intended to say. Correction of the November 30, 1993 **Judgment** by the court on its own initiative under Rule 60(a) does not toll the period for filing an appeal. Defendant's appeal was not timely filed.

The determination by the Tenth Circuit that no statutory authority is required for amendment of a clerical error impermissibly expands the power and authority of the district court to alter and amend its decisions.

CONCLUSION

Petitioner Kelly M. O'Gilvie respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Tenth Circuit in these matters.

Respectfully submitted,

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APPENDIX CONTENTS

Pursuant to Supreme Court Rule 14(h), following this page are copies of the following documents:

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

KELLY M. O'GILVIE, Plaintiff-Appellant/ Cross-Appellee, v. UNITED STATES OF AMERICA, Defendant-Appellee/ Cross-Appellant.	)	Nos. 94-3004 & 94-3031
UNITED STATES OF AMERICA, Plaintiff-Appellant, v. KEVIN M. O'GILVIE, STEPHANIE L. O'GILVIE, Defendants-Appellees.	)	No. 94-3058

Appeals from the United States District Court
for the District of Kansas
(D.C. Nos. 90-CV-1075 and 92-1358-MLB)

(Filed Sep. 19, 1995)

Kenneth W. Rosenberg, Attorney, Tax Division (Loretta C. Argrett, Assistant Attorney General, and Kenneth L.

Greene, Attorney, Tax Division, Of Counsel: Randall K. Rathbun, United States Attorney, with him on the briefs), Department of Justice, Washington, D.C., for the United States.

Linda D. King of Wilkinson & King, Wichita, Kansas, for the O'Gilvies.

Before MOORE and LOGAN, Circuit Judges, and DAUGHERTY, District Judge.*

LOGAN, Circuit Judge.

The substantive issue raised in these consolidated appeals is whether punitive damages recovered in a case involving physical injury are excluded from gross income under § 104(a)(2) of the Internal Revenue Code (I.R.C.), 26 U.S.C. § 104(a)(2), a question which has split the circuits four to one.[1] We must also decide three threshold questions relating to our appellate jurisdiction.

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* The Honorable Frederick A. Daugherty, Senior United States District Judge, United States District Court for the Western, Eastern and Northern Districts of Oklahoma, sitting by designation.

[1] *Compare Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994) and *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990) *with Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994).

I

The punitive damages that are the subject of these appeals were awarded in a products liability action filed after Betty O'Gilvie died of toxic shock syndrome. Her widower, Kelly M. O'Gilvie, acting as administrator of her estate and as guardian of their minor children, Kevin M. O'Gilvie and Stephanie L. O'Gilvie, brought suit against International Playtex, Inc., which manufactured the tampons used by Betty O'Gilvie. The jury awarded actual damages of $1,525,000 and punitive damages of $10,000,000. *See O'Gilvie v. International Playtex, Inc.*, 609 F. Supp. 817, 818 (D. Kan. 1985), *aff'd in part and rev'd in part*, 821 F.2d 1438 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). The district court ordered a remittitur of the punitive award to $1,350,000, 609 F. Supp. at 819-20, but on appeal this court ordered reinstatement of the full punitive award, 821 F.2d at 1448-49.

In 1988, the O'Gilvie estate distributed the net proceeds of the punitive damages award to the beneficiaries, the taxpayers here. After attorney's fees and expenses the net proceeds were $4,967,292. Each of the three taxpayers reported their share of the punitive damages on their individual federal income tax returns for the 1988 tax year in the following amounts:

Kelly M. O'Gilvie	$2,483,646
Kevin M. O'Gilvie	$1,241,823
Stephanie L. O'Gilvie	$1,241,823

In August 1989, taxpayer Kelly M. O'Gilvie filed a claim for refund with respect to his 1988 income taxes, asserting that punitive damages were excluded from gross income under I.R.C. § 104(a)(2) as damages

received "on account of personal injury."[2] When the Internal Revenue Service took no action on his refund claim he filed suit against the United States to recover the refund plus interest. He later filed an amended complaint in his suit, adding a claim for the refund of taxes paid on interest on the portion of the punitive damages award that was the subject of the remittitur.[3] The parties filed cross-motions for summary judgment, each asserting there was no genuine issue of material fact and that the taxability of punitive damages could be decided as a matter of law.

In November 1989, taxpayers Kevin M. O'Gilvie and Stephanie L. O'Gilvie filed claims for refunds asserting the punitives were excludable from income.[4] The IRS approved, and after submitting them to Congress as

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[2] He sought a refund of $695,421, the tax that resulted from including the punitive damages in income.

[3] Kelly O'Gilvie had filed in February 1991 a second administrative claim for refund for the 1988 tax year. That claim asserted an overpayment of taxes for 1988 in addition to the overpayment previously claimed with respect to the punitive damages. The alleged additional overpayment arose from interest he received on the portion of the punitive damages award that was remitted by the district court but reinstated by our court. The additional overpayment claimed was the tax paid on interest received for the period between the entry of the district court's original judgment, which was for $1,350,000, and the judgment entered after the remand, which was in the amount of $10,000,000. The interest computed at the federal postjudgment rate pursuant to 28 U.S.C. § 1961 totalled $875,000. The claim sought a refund of $260,437 in taxes paid on that interest. The Internal Revenue Service took no action on that claim.

[4] Kevin and Stephanie O'Gilvie each requested a refund of $346,319.

required for large refunds by I.R.C. § 6405, processed the refunds. Kevin and Stephanie received refund checks in July 1990. Two years later, however, the IRS filed an action against each of them for recovery of an erroneous refund under I.R.C. § 7405, asserting the punitive damages award was taxable. The parties in that case agreed to be bound by the decision in Kelly O'Gilvie's refund suit.

On May 26, 1992, the district court issued a memorandum and order in the refund suit, finding that the punitive damages were taxable. Kelly O'Gilvie moved for reconsideration of the district court's opinion, and on August 26, 1992, the district court reversed itself and entered a judgment holding that punitive damages were excludable from gross income under § 104(a)(2). On October 26, 1992, the United States filed a notice of appeal to our court from the August 26 judgment.

On November 11, Kelly O'Gilvie filed a motion for summary judgment asserting that the interest on the portion of the punitive damages award that was the subject of the remittitur was excludable from income under § 104(a)(2) as a matter of law. The United States opposed that motion, arguing that the interest was taxable and requesting summary judgment in its favor. Because of the remaining issue concerning taxability of the interest, on October 27, 1992, the district court entered an order withdrawing the August 26 judgment.[5] On November 30,

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[5] The district court order stated:

> On August 26, 1992, pursuant to a Memorandum and Order of even date, the court entered judgment in favor of the plaintiff on plaintiff's motion for summary judgment (Doc. 34). Since that time, it has been

1993, the district court issued a memorandum and order finding that the interest during the interim period was taxable, and granted the government summary judgment on that issue. On December 7, 1993, the district court entered an amended order stating:

> IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of August, 1992, the motion for reconsideration filed by the plaintiff is granted and his motion for summary judgment is also granted; IT IS FURTHER ORDERED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant is granted and the Court holds that the "additional Amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

U.S. App. 57.

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brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 (Doc. 25) which has not yet been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.

Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P., the judgment entered on August 26, 1992 is hereby withdrawn, subject to reinstatement at the conclusion of the case.

IT IS SO ORDERED.

U.S. App. 46.

On January 5, 1994, Kelly O'Gilvie filed a timely notice of appeal (No. 94-3004). On February 1, 1994, the government filed its cross-appeal (No. 94-3031).[6]

II

Taxpayer Kelly O'Gilvie argues that we do not have subject matter jurisdiction over the government's cross-appeal in No. 94-3031 because the notice of appeal was not timely. Taxpayers Kevin and Stephanie O'Gilvie assert that we lack jurisdiction over the government's appeal in No. 94-3058 because the government's suit against them for erroneous refund was untimely and because federal courts do not have jurisdiction to review refunds that have been approved by the Joint Committee on Taxation under I.R.C. § 6405. We address these issues in turn.

A

When the United States is a party in a civil case, "the notice of appeal may be filed by any party within 60 days" after the date of entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1). The United States filed its notice of appeal more than sixty days after the district court entered its judgment of November 30, 1993, but less than sixty days after entry of the amended judgment of December 7, 1983. Thus, if the November 30 judgment was final and appealable the government's

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[6] No. 94-3058 is the government's appeal from the district court order of February 22, 1994, dismissing the action for erroneous refund against Kevin and Stephanie O'Gilvie.

appeal was not timely; on the other hand, if the amended judgment of December 7 was the final and appealable order the government's appeal was timely.

Taxpayer Kelly O'Gilvie asserts that the amended judgment of December 7 merely corrected a clerical error in the first judgment under Fed. R. Civ. P. 60(a), and thus the time to appeal ran from November 30, 1993. *See White v. Westrick*, 921 F.2d 784 (8th Cir. 1990). However, a careful reading of all of the memoranda, orders, and "judgments" entered in this case indicates that the October 27 order withdrew the August 26 judgment on the punitives issue. Thus the district court did not enter judgment on the punitive damages issue until December 7. The government's cross-appeal is timely.

B

Taxpayers Kevin O'Gilvie and Stephanie O'Gilvie argue that the government's complaint seeking recovery of refunds made to them was time-barred. "Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund." I.R.C. § 6532(b). The complaint filed on July 9, 1992, alleged that the IRS refunded the taxes at issue on July 9, 1990. Taxpayers admit that they received the refund checks in the mail on July 9, 1990, but argue that a refund is made for purposes of § 6532(b) when the check is mailed, rather than when it is received. Taxpayers assert that because the checks had to have been mailed before July 9, 1990, the suit was filed more than two years after the refund was made. The question

thus is whether a refund is "made" under § 6532(b) when the check is mailed or when it is received.

Taxpayers cite *United States v. Steel Furniture Co.*, 74 F.2d 744 (6th Cir. 1935), for their assertion that § 6532(b) must be construed liberally in their favor. That case, however, construed the scope of the predecessor of § 7405, which was not a statute of limitations provision. In interpreting the predecessor to the statutory limitations provision in § 6532(b) the Supreme Court stated that "[t]he Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has 'clearly manifested its intention' to raise a statutory barrier." *United States v. Wurts*, 303 U.S. 414, 416 (1938). Further, generally statutes of limitations sought to be applied against the government are strictly construed in favor of the government. *See, e.g., Badaracco v. Commissioner*, 464 U.S. 386, 391 (1984).

Although we have not addressed the precise question whether a refund is "made" under the current § 6532(b) when the check is mailed or when it is received, in *Paulson v. United States*, 78 F.2d 97 (10th Cir. 1935), we held that the date a refund was made for purposes of the predecessor of § 6532(b) was the date of receipt rather than the date the Commissioner approved and signed the schedule of refunds. As we stated there,

> [T]he refund is made when the money is paid. Refund means to pay back, return, restore, make restitution. That is the ordinary and popular concept of the word, and in the absence of a contrary indication, it must be presumed that the Congress used it in that generally accepted

> sense. The return, restoration, and restitution of the money is made when the check in payment of the obligation is delivered.

Paulson, 78 F.2d at 99. Our *Paulson* decision is supported by *Wurts*, which stated that "[t]he Commissioner's signature on a schedule of overassessments does not finally establish a claimant's right to a refund . . . [because he could later] – even after a check was signed and mailed – cancel the payment." 303 U.S. at 417-18.

Taxpayers assert that if the date of mailing is in evidence, as it impliedly is here, that as between the date of mailing and the date of receipt, the date of mailing is the time from which the statute runs. But as we stated in *Paulson*, "[o]rdinarily a statute of limitation does not begin to run until a suit could be brought." 78 F.2d at 99. Here, the government could not have brought suit to recover the refund until the taxpayers had received the refund checks on July 9, 1990. Thus, the statute of limitations began to run on July 9, 1990, when taxpayers received their refund checks. *Paulson*, 78 F.2d at 99; *see United States v. Carter*, 906 F.2d 1375, 1377 (9th Cir. 1990) ("refund is considered to have been made on the date the taxpayer received the refund check"); *see also* 14 Jacob Mertens, Jr., *The Law of Federal Income Taxation* § 54(a).71 (rev. ed. 1993) (§ 7405 suit must be brought "within two years from the date of delivery of the refund check"); Michael I. Saltzman, *IRS Practice and Procedure* ¶ 14.08[2][g] at 14-60 (2d ed. 1991) (same). The government's complaint, filed exactly two years later, was timely.

C

Taxpayers Kevin and Stephanie O'Gilvie also assert that because their refunds were submitted to the Joint Committee on Taxation for approval under I.R.C. § 6405(a), the United States cannot seek judicial review. Section 6405(a) at that time provided

> [n]o refund or credit of any income . . . tax . . . in excess of $200,000 shall be made until after the expiration of 30 days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and the summary of facts and the decision of the Secretary, is submitted to the Joint Committee on Taxation.[7]

Plaintiffs assert that judicial review of the Secretary's approved decision would usurp congressional legislative power.

We first note that under § 6405(a) the Joint Committee merely received a report of the refunds and did not object to them, thus the Committee did not affirmatively approve the refunds. *See Philadelphia & Reading Corp. v. Commissioner*, 944 F.2d 1063, 1067 (3d Cir. 1991) ("If the Joint Committee does not reject the refund [reported under § 6405(a)] within the thirty-day period, the IRS must then process the refund."). Once the IRS has submitted its report, summary of facts and decision of the Secretary to the Joint Committee on Taxation and that

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[7] A 1990 amendment increased the amount required to be submitted to the Joint Committee from $200,000 to $1,000,000, *see* Pub. L. No. 101-508, § 11834(a), 104 Stat. 1388, 1388-560 (1990).

Committee has passed on the report, we see no constitutional or statutory impediment to judicial review of refunds. *Cf. Oxford Life Ins. Co. v. United States*, 574 F. Supp. 1417, 1428 (D. Ariz. 1983), *aff'd in part and rev'd in part on other grounds*, 790 F.2d 1370 (9th Cir. 1986) (holding that it could not rule on whether government was entitled to recover refund until after the IRS submitted its report, summary of facts and decision of Secretary to the Joint Committee on Taxation pursuant to 26 U.S.C. § 6405).

We believe that § 6405 was enacted so that the Committee could be involved in oversight of payment from the Treasury, not to prevent judicial review of refund decisions. As the government points out, if we were to accept taxpayers' argument, the government could never seek review of a refund that had been approved by the Committee. We hold that the district court had jurisdiction to review the refund, and thus we have jurisdiction to review the district court's determination.

III

We now address the substantive issue whether punitive damages in a products liability action for wrongful death are excludable from gross income under § 104(a)(2). We review this issue of law de novo. *See Estate of Moore v. Commissioner*, 53 F.3d 712, 714 (5th Cir. 1995).

Section 61(a) of the Internal Revenue Code defines "gross income" broadly: "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived." I.R.C. § 61(a). Thus, Congress intended to "tax all gains except those specifically

exempted." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 430 (1955). Plaintiffs assert that the punitive damages award in the instant case were excluded from gross income by I.R.C. § 104(a)(2), which provided:[8]

> § 104. Compensation for injuries or sickness. . . . [G]ross income does not include –
>
> . . . .
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.[9]

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[8] The language quoted is the version of the statute in effect at the time the punitives were awarded to the O'Gilvies, and thus it controls here. The statute was later amended, *see* Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (1989). The text of this amendment is discussed *infra*.

[9] The district court initially found that the punitive award did not fit the § 104(a)(2) exception, implicitly rejecting plaintiffs' assertion that the plain language of the statute excludes any damages received as a result of the underlying personal injury lawsuit. The court thus found that the phrase "on account of" was ambiguous, and that the government's view that punitive damages are not awarded "on account of personal injury" was more reasonable when viewed in light of the statute's underlying purpose "to assist taxpayers burdened with sickness or injury and make them whole from a previous loss of personal rights." D.C. memo and order of May 26, 1992, U.S. App. 31 (citing *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)). The district court determined that the punitive award was not received "on account of personal injury" and therefore was gross income.

The same day the district court issued its initial decision, the Supreme Court issued an opinion in *United States v. Burke*, 504 U.S. 229 (1995), which addressed whether settlement of a Title VII back pay claim was excludable under § 104(a)(2). On

Four Circuits have held that noncompensatory punitive damages are not received "on account of" personal injuries; therefore they are not excludable from gross income under § 104(a)(2). *See Wesson v. United States*, 48 F.3d 894 (5th Cir. 1995); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2576 (1995); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990). These decisions begin with the threshold determination that the language of § 104(a)(2), that gross income does not include "the amount of any damages received . . . *on account of* personal injuries or sickness," is ambiguous. They then interpret the statute and determine that Congress intended to exclude only damages awarded to *compensate* for a tort-like injury, relying on some of or all of the following: (1) the statutory context and title, (2) the principle that exclusions from income should be construed narrowly, (3) the policy and legislative history of § 104, (4) a Treasury Revenue Ruling addressing this issue, (5) the 1989 amendment to § 104(a)(2), and (6)

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plaintiff's motion for reconsideration, the district court determined that the *Burke* decision "altered the analysis" and required a reversal of its decision. D.C. memo and order of August 26, 1992, U.S. App. 42-44. It stated that "[i]n our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. . . . The [*Burke*] opinion makes clear that the proper inquiry for purposes of § 104(a)(2) is on the nature of the claim underlying the taxpayers' damages award." *Id.* at 43. Because this is a tort-like suit, the court found that the punitive award was excludable from income under § 104(a)(2) and granted plaintiff's motion for summary judgment.

Supreme Court cases discussing § 104(a)(2) in other contexts. Because punitive damages (generally) are not intended to compensate, but to deter and punish, these circuits conclude that § 104(a)(2) does not exclude punitive damages from income.[10]

In contrast, the Sixth Circuit recently held that the plain language of § 104(a)(2) unambiguously exempts punitives from gross income, *see Horton v. Commissioner*, 33 F.3d 625, 630 (6th Cir. 1994). The *Horton* Court found that the "plain meaning of the broad statutory language [of § 104(a)(2)] simply does not permit a distinction between punitive and compensatory damages." *Id.* at 631 (citation omitted). That opinion relied on the Supreme Court's opinion in *United States v. Burke*, 504 U.S. 229 (1992).

The issue in *Burke* was whether a claim under Title VII of the Civil Rights Act of 1964 sought to redress "a personal injury" under § 104(a)(2). *Id.* at 237. The Court stated that the statute was ambiguous and the legislative history was not instructive. Therefore, the Court relied on the regulation relating to the statute, which defined "damages" as "an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights." 26 C.F.R. § 1.104-1(c). The Court noted that under traditional tort law, a variety of remedies are available, including pain and suffering, emotional distress, harm to reputation, and punitive damages. Because Title VII does

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[10] These courts looked to state law to determine whether punitives in each case were compensatory in nature, and found they were not. The O'Gilvies do not argue here that the punitives they received are compensatory in nature.

not provide these types of remedies, the Court concluded that a Title VII claim was not a type of personal injury claim.

Relying on *Burke*, the *Horton* opinion concluded that in determining whether an award is excludable under § 104(a)(2), it should focus exclusively " 'on the nature of the claim underlying [the taxpayer's] damages award.' " *Horton*, 33 F.3d at 631 (quoting *Burke*, 504 U.S. at 237). Further, it stated "[t]his is 'the beginning and end of the inquiry.' " *Horton*, 33 F.3d at 631 (citation omitted).[11]

The flaw in the *Horton* analysis is that *Burke* focused on the nature of the claim to determine if it involved a personal injury under § 104(a)(2); it did not address whether punitive damages were "received on account of" personal injuries or sickness and thus excludable under § 104(a)(2). *See Wesson*, 48 F.3d at 901. This view of *Burke* is supported by the recent opinion in *Commissioner v. Schleier*, 115 S. Ct. 2159 (1995).

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[11] The *Horton* court stated that because the taxpayer's claim was for a personal, physical injury, the entire recovery, including punitives, were received "on account of" their personal injuries. *Horton*, 33 F.3d at 631. It determined that the statute was not amenable to distinctions between punitive and compensatory damages. It also relied to some extent upon the fact that punitive damages in Kentucky serve a compensatory function. While superficially this appears to be a basis for distinguishing *Horton*, the Sixth Circuit broadly rejected the suggestion that even noncompensatory punitive damages should be included in gross income. *See id.* at 631-32.

Schleier addressed whether ADEA liquidated damages are excludable under § 104(a)(2), holding that they are not. The Supreme Court clarified that

> the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in Burke establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is "based upon tort or tort type rights"; and second, the taxpayer must show that the damages were received "on account of personal injuries or sickness."

Id. at 2167. Thus *Schleier* made plain that *Horton*, and the district court in the instant case, misconstrued *Burke* as holding that § 104(a)(2) required *only* that there be a tort-type injury.[12]

Neither the *Burke* nor the *Schleier* Court addressed the question whether the phrase in § 104(a)((2) "on account of" personal injuries is ambiguous. With respect to this we agree with the four circuits that have found it is susceptible of at least two meanings:

> [T]he language "on account of" [may] describe a causal relationship between damages and injury according to which damages are received "on

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[12] *Schleier* further aids our analysis by its statement that "each element of [a hypothetical] settlement is recoverable not simply because the taxpayer received a tort settlement, but rather because *each element* of the settlement satisfies the requirement . . . that the damages were received 'on account of personal injuries or sickness.' " *Schleier*, 115 S. Ct. at 2164 (emphasis added).

> account of" a personal injury whenever a showing of personal injury is a prerequisite for the award of those damages. In other words, any damages ultimately received in a case involving personal injury are damages received "on account of" that personal injury. [Another interpretation is] one which defines a causal relationship according to which damages are received "on account of" personal injuries only when the injury in and of itself justifies such damages. Under [this] interpretation, punitive damages are not encompassed by the exclusion, because those damages are received, not because of a personal injury, but in large part "on account of" a defendant's egregious conduct and the jury's desire to punish and deter such conduct.

Reese, 24 F.3d at 230-31.[13]

Thus, "[s]ection 104(a)(2) could mean that all damages recovered in a personal injury suit are excluded, or it could mean that only those damages that purport to compensate the plaintiff for the personal injury suffered are received on account of personal injury." *Wesson*, 48 F.3d at 897. Because the phrase "on account of personal injury" is ambiguous, we must ascertain what Congress intended. In doing so, we look to the design and language of the statute as a whole, as well as to external aids

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[13] Similarly, *Miller* explained that "on account of" suggests causation, but that causation could be either "but-for causation" – i.e., the plaintiff would not have recovered punitives but for the injury, or it could be sufficient causation – e.g., personal injury alone does not sustain a punitive damages award, a plaintiff must also show egregious conduct. *Miller*, 914 F.2d at 589-90.

that may reveal Congress' intent. *See Crandon v. United States*, 494 U.S. 152, 158 (1990).

The title of § 104, "Compensation for injuries or sickness," suggests that Congress intended "to exclude [from gross income] damages which *compensate* a taxpayer for injuries." *Hawkins*, 30 F.3d at 1083 (emphasis added). All of the subsections of § 104 address replacement for losses resulting from injury or sickness, and thus are compensatory in nature.[14] Read in context, then, § 104(a)(2) logically addresses compensatory payments. *Reese*, 24 F.3d at 231 (citing *King v. Saint Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("meaning of statutory language, plain or not, depends on context")). This restrictive reading of § 104(a)(2) is bolstered by "the default rule of statutory interpretation that exclusions from income must be narrowly construed." *Schleier*, 115 S. Ct. at 2163 (quoting *Burke*, 504 U.S. at 248).

We also look to the legislative history to construe an ambiguous statutory phrase. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (statute must be construed in light of legislative purpose). The Federal Circuit extensively discussed the legislative history of § 104(a)(2) in *Reese*, 24 F.3d at 232-33. The predecessor statute to § 104,

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[14] "Section 104(a)(1) exempts amounts received under workmen's compensation acts; section 104(a)(3) exempts amounts received through accident or health insurance; section 104(a)(4) exempts amounts received as a pension, annuity, or similar allowance for personal injuries or sickness; and section 104(a)(5) exempts amounts received as disability income." *Reese*, 24 F.3d at 231.

§ 213(b)(6) of the Revenue Act of 1918, was enacted because:

> Under the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income. The proposed bill provides that such amounts shall not be included in gross income.

H.R. Rep. No. 767, 65th Cong. 2d Sess. 9-10 (1918) (quoted in *Reese*, 24 F.3d at 233). The Federal Circuit concluded that the § 104 exclusions are based on the theory of "conversion of capital assets," and that "it would be inconsistent with the legislative history to treat punitive damages as excludable from income, since punitive damages in no way resemble a return of capital." 24 F.3d at 233 (citing *Glenshaw Glass*, 348 U.S. at 432 n.8 ("The long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages. . . . Damages for personal injury are by definition compensatory only.")).

Other circuits have found the idea that § 104(a)(2) is limited to compensatory damages consistent with the supposed underlying purpose of § 104 to make the taxpayer whole. *See, e.g., Hawkins*, 30 F.3d at 1083-84. However, this rationale is somewhat problematic. If, for example, a plaintiff recovers for wages lost due to his being injured in an accident, that amount would be excludable from gross income under § 104(a)(2), and thus

not taxable. But if he had actually worked his wages would be reportable income subject to taxes; thus the § 104(a)(2) exclusion has made him more than whole. *See Hawkins*, 30 F.3d at 1087 (Trott, J., dissenting).

We are further troubled by the language of the 1989 amendment to § 104(a)(2), effective after the instant case was brought, but surely bearing on the question of congressional intent. The amendment added the provision that "Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness." The taxpayers contend that this amendment, which uses narrowing language, compels the conclusion that punitive damages were excludable under § 104(a)(2) before the amendment.

> Revised section 104 utilizes a double negative. . . . Since punitive damages in a case not involving physical injury or physical sickness or singled out as being includable in gross income, the clear implication of Congress' phraseology is that punitive damages in a case involving physical injury or physical sickness are excludable, and were excludable even before the amendment.

Horton, 33 F.3d at 631 n.12; *see also Hawkins*, 30 F.3d at 1086-87 (Trott, J., dissenting) (stating that if punitive damages were taxable before and after the amendment, as Ninth Circuit majority held, the amendment was meaningless because punitive damages were already taxable).[15]

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[15] Another way to read the amendment is to assume all punitive damages were taxable before 1989 and the amendment

The Ninth and Fifth Circuits have rejected this argument, pointing out that " 'Congress may amend a statute simply to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases.' " *Wesson*, 48 F.3d at 901 (quoting *Hawkins*, 30 F.3d at 1082). These courts reasoned that Congress adopted the amendment in part to overrule then-recent cases which held that damages received in non-physical injury cases were excludable under § 104(a)(2). *See Threlkeld v. Commissioner*, 848 F.2d 81, 83-84 (6th Cir. 1988); *Roemer v. Commissioner*, 716 F.2d 693, 700 (9th Cir. 1983); *see also Miller v. Commissioner*, 93 T.C. 330 (1989) (later reversed, *Commissioner v. Miller*, 914 F.2d 586 (4th Cir. 1990)).

The legislative history of the 1989 amendment indicates the original House of Representatives bill would have made all damages received in non-physical injury cases taxable. *See* H.R. Rep. No. 101-247, 101st Cong., 1st Sess. at 1354-55, *reprinted in* 1989 U.S.C.C.A.N. at 1906, 2824-25. The Senate refused to pass the House version, and the final bill was a compromise. *See* H.R. Rep. No. 101-386, 101st Cong., 1st Sess. at 623, *reprinted in* 1989 U.S.C.C.A.N. at 3225-26. It is apparent to us that when Congress was debating the amendment it believed that § 104(a)(2) applied to punitive as well as compensatory damages. As the *Hawkins* court pointed out, however, even if that was what Congress believed, it does not

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was intended to exclude from gross income punitives in physical injury cases. However, if that was the case, Congress could simply have amended § 104 to read: "[p]unitive damages in cases involving physical injury or sickness are excludable." *Hawkins*, 30 F.3d at 1087 (Trott, J., dissenting).

"indicate that Congress gleaned the true intent of previous Congressess [sic], only that Congress was aware that courts had recently so interpreted the section." *Hawkins*, 30 F.3d at 1082 n.6. Further, if Congress was concerned primarily with nonphysical injury cases, it simply may not have considered punitive damages received in physical injury cases or it may have been " 'deferring to the courts' " on this issue. *Id.* at 1082 n.7 (citation omitted.)[16] The Ninth Circuit expressed doubt, given its belief that excluding punitive damages is inconsistent with § 104(a)(2)'s title and purpose, that Congress intended to exclude any noncompensatory punitive damages. However, that court "express[ed] no opinion on the excludability of punitive damages received after 1989 in physical injury cases," and expressed a "hope that Congress will shortly clear up the issue." *Id.*

We believe that using the amendment to interpret Congress' intent in 1954 (or 1918) is a questionable practice, particularly because of the long lapse of time and because the legislative history of both the original statute and the amendment are not enlightening. *See Wesson*, 48 F.3d at 901 (" 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one' ") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)). Even if we were to agree with the Sixth Circuit's *Horton* opinion that the 1989 amendment at the very least suggests punitives were excludable under § 104 before the

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[16] The court also stated that "even if the 1989 amendment makes punitive damages received in physical injury cases excludable, this implication could be inadvertent." 30 F.3d at 1082 n.7.

amendment, much of its reasoning, which is similar to that of the district court in the instant case, was undermined by the Supreme Court in *Schleier*.

In sum, it is not clear whether Congress intended to exclude punitive damages from income under § 104(a)(2). Although "good reasons tug each way" in this case, we need not decide "which tug harder," because we must follow the default rule that exclusions from income are narrowly construed. *Burke*, 504 U.S. at 248 (Souter, J., concurring). We thus join the majority of the circuits that have addressed this issue in holding that § 104(a)(2) does not exclude punitive damages from income.[17]

REVERSED.

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[17] Because we have determined that punitive damages are not excludable from income, we need not address Kelly O'Gilvie's argument that interest on the portion of punitive damages that was subject to the remittitur constituted a punitive damages award.

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KELLY M. O'GILVIE

JUDGMENT IN A CIVIL CASE

v.

(Filed May 26, 1992)

UNITED STATES OF AMERICA

CASE NUMBER: 90-1075

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of May, 1992, the motion for summary judgement filed by the defendant is granted.

May 26, 1992
Date

RALPH L. DeLOACH
Clerk

Entered on docket 5/26/92

/s/ B. Hatchett
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kelly M. O'Gilvie Plaintiff, v. United States of America Defendant.	(Filed Aug. 26, 1992) CIVIL ACTION NO. 90-1075-B

MEMORANDUM AND ORDER

This matter comes before the court on O'Gilvie's motion for reconsideration (Doc. 28) of the court's May 26, 1992 order granting summary judgment to the government. The court held O'Gilvie's punitive damages award was not excluded from income tax under 26 U.S.C. § 104(a)(2), which provides in relevant part that "gross income does not include –

"(2) the amount of any damages received . . . on account of personal injuries . . . "

O'Gilvie contends the recent decision of the United States Supreme Court in *U.S. v. Burke*, 60 U.S.L.W. 4404 (U.S. May 26, 1992) has altered the analysis used by this court in arriving at its decision and requires the decision to be reversed. Additionally, O'Gilvie contends this court misapprehended his position on the applicability of the 1989 amendments to § 104(a)(2).

The issue decided by the Supreme Court in *Burke* was "whether a payment received in settlement of a backpay

claim under Title VII . . . is excludable from the recipient's gross income under § 104(a)(2)." *Id.* The Court first explained that the term "personal injuries" is linked to the existence [sic] a tort claim against the payor. *Id.* at 4405. Thus, the taxpayers were required to show that Title VII, the legal basis for their recovery of backpay, redressed a tort-like personal injury. The Court analyzed the remedies[1] available to persons subjected to unlawful discrimination under Title VII and found nothing in the statute's remedial scheme that compensated a plaintiff for any of the traditional harms associated with personal injury. *Id.* at 4406-07. Accordingly, the Court held Title VII claims did not redress tort-like personal injuries within the meaning of § 104(a)(2) and therefore the award under Title VII was *includable* as gross income. *Id.* at 4407.

In our previous order, this court focused on the nature of the punitive damage award itself, rather than the nature of the underlying claim. In light of *Burke*, we believe our focus was misplaced. The Supreme Court's opinion makes clear that the proper inquiry for purposes of § 104(a)(2) is on the nature of the claim underlying the taxpayers' damages award. *Id.* at 4406. As we recognized in our previous order, the underlying suit giving rise to O'Gilvie's recovery of punitive damages is indisputedly tort-like in nature. Slip opinion at 3. Accordingly, the court believes its previous order is contrary to *Burke* and must be reversed.

O'Gilvie also argues this court mistakenly believed he agreed the 1989 amendment was inapplicable. The

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[1] The court noted that remedial principles figure prominently in the definition of torts. *Id.* at 4405.

court noted in footnote 2 of its order that the amendment became effective on July 10, 1989. Both O'Gilvie and the government agree the punitive damage award was received prior to that date. The parties thus agreed the amendment does not *apply* to this case.

The court understands O'Gilvie's argument to be that the amendment served to confirm his position that the punitive damage award is not includable in gross income. In *Burke*, the Supreme Court noted: "Congress' 1989 amendment to § 104(a)(2) provides further support for the notion that 'personal injuries' includes physical as well as non-physical injuries. . . . At the same time, Congress amended § 104(a)(2) to allow the exclusion [from gross income] of punitive damages only in cases involving 'physical injury. . . . ' " *Id.* at 4406, n. 6. While this *dicta* appears to support O'Gilvie's position, it is unnecessary to resolve the applicability of the 1989 amendments in view of this court's decision on reconsideration.

The motion for reconsideration (Doc. 28) is hereby granted and O'Gilvie's motion for summary judgment (Doc. 15) is sustained.

IT IS SO ORDERED.

At Wichita, Kansas, this 26th day of August, 1992.

/s/ Monti L. Belot
Monti L. Belot
United States
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KELLY M. O'GILVIE
Plaintiff

v.

UNITED STATES OF AMERICA
Defendant

JUDGMENT IN A CIVIL CASE

(Filed Aug. 26, 1992)

CASE NUMBER: 90-1075-B

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and entered on the docket 8/26/92 that the plaintiff's motion for reconsideration (Doc. 28) is hereby granted and plaintiff O'Gilvie's motion for summary judgment (Doc. 15) is sustained.

ENTERED ON THE DOCKET
DATE: 8-26-92

August 26, 1992
Date

RALPH L. DeLOACH
Clerk

/s/ V. Williams
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kelly M. O'Gilvie Plaintiff, v. United States of America Defendant.	**CIVIL ACTION** No. 90-1075-B (Filed Oct. 27, 1992)

ORDER

On August 26, 1992, pursuant to a Memorandum and Order of even date, the court entered judgment in favor of the plaintiff on plaintiff's motion for summary judgment (Doc. 34). Since that time, it has been brought to the court's attention that there is an issue which was raised in the amended pretrial order filed April 23, 1992 (Doc. 25) which has not yet been fully briefed by the parties. Both parties desire to have the issue ruled upon before a final judgment is entered.

Accordingly, pursuant to Rule 60(a), Fed. R. Civ. P., the judgment entered on August 26, 1992 is hereby withdrawn, subject to reinstatement at the conclusion of the case.

IT IS SO ORDERED.

At Wichita, Kansas, this 27th day of October 1992.

/s/ Monti L. Belot
Monti L. Belot
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Kelly M. O'Gilvie
Plaintiff,
v.
United States of America
Defendant.

(Filed Nov. 30, 1993)
CIVIL ACTION
NO. 90-1075-MLB

MEMORANDUM AND ORDER

This case comes before the court on O'Gilvie's motion for summary judgment, pursuant to Fed. R. Civ. P. 56. (Doc. 41) In a previous opinion, this court held O'Gilvie's punitive damage award was excludable from income tax pursuant to § 104(a)(2) of the Internal Revenue Code. O'Gilvie's present motion seeks a ruling on whether the statutory interest paid on the award during the pendency of appeal is likewise excludable.

Some background on this case is necessary to an understanding of the motion. O'Gilvie's wife died of toxic shock syndrome. O'Gilvie brought a products liability action individually and on behalf of his deceased wife's estate to recover against Playtex. The jury awarded actual damages of $1.525 million and punitive damages of $10 million. The district court ordered the punitive damage award reduced to $1.35 million, effective from February 26, 1985. *O'Gilvie v. Intern. Playtex, Inc.*, 609 F. Supp. 817, 819 (D. Kan. 1985). The Tenth Circuit reversed the district court's order of remittitur and reinstated the $10 million punitive damage award. *O'Gilvie v. Intern. Playtex, Inc.*, 821 F.2d 1438, 1450 (10th Cir. 1987), *cert. denied*, 486 U.S.

1032 (1988). The Tenth Circuit made no comment with respect to interest on the amount of the judgment which it restored by its order. The district court entered judgment for O'Gilvie in accordance with the Tenth Circuit's mandate on June 10, 1988.

The government made an assessment on O'Gilvie's punitive damage award. O'Gilvie paid the tax, then commenced this action seeking a refund.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

DISCUSSION

The issue before the court is whether the interest which accrued on the difference between $1.35 million and $10 million from the date of the district court's entry of remittitur on the punitive damage award to the district court's entry of judgment in accordance with the Tenth Circuit's mandate is taxable.[1] The government argues that

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[1] The government informs the court that Playtex paid O'Gilvie the full amount of the damage award ($11.525 million) with interest on the entire sum, including the amount restored by the Tenth Circuit's order. This appears to be confirmed by the language of the supersedeas bond filed January 15, 1988. O'Gilvie informs the court that the amount was calculated according to 28 U.S.C. § 1961(b) at the federal post-judgment rate.

statutory interest paid on an award of damages is separate and distinct from those damages and does not fall within the § 104(a)(2) exclusion. *Kovacs v. Commissioner*, 100 T.C. 124 (1993). O'Gilvie's argument is that because he had no legally enforceable claim to the remitted amount during the interim period before the $10 million award was reinstated and further because the Tenth Circuit's order was silent as to interest, the "additional amount" he ultimately received was really not interest on the remitted award. Rather, he contends that the "[additional]" . . . amount looks more like a larger personal injury award than the payment for the use of forbearance of money. (Doc. 42)

The court accepts that prior to the district court's entry of judgment reinstating the $10 million award, O'Gilvie had not realized any taxable income in the form of interest on the remitted amount. *See Helvering v. Horst*, 311 U.S. 112 (1940). This fact does not lead to the conclusion that the government was forever barred from assessing tax on the amount in question. O'Gilvie's argument elevates form over substance. The issue is not, as O'Gilvie suggests, whether a legally enforceable right to receive the remitted amount of punitive damages existed during the interim period between the entry of remittitur and reinstatement of the $10 million award. O'Gilvie improperly focuses upon *when* the punitive damage award was received instead of the fact that it was eventually realized. In the court's view, the issue is *whether* the "additional amount" received on the punitive damage award is interest and therefore "income" within the meaning of the Internal Revenue Code.

When it enacted the income tax, Congress intended " 'to use the full measure of its taxing power.' " *Commissioner v. Kowalski*, 434 U.S. 77, 82 (1977) (Citations omitted). The Internal Revenue Code broadly defines income to include all "accessions to wealth." 26 U.S.C. § 61(a);[2] *Lonsdale v. C.I.R.*, 661 F.2d 71, 72 (5th Cir. 1981). O'Gilvie's actual receipt of additional monies calculated at the statutory interest rate on the remitted amount falls within the scope of § 61(a), for it unquestionably constitutes an accession to wealth. The lapse of time before O'Gilvie actually received the "additional amount" on the remitted amount does not vitiate the status of the money as income.

O'Gilvie argues the statutory interest is excluded from tax under 26 U.S.C. § 104(a)(2), which provides in relevant part that "gross income does not include –

"(2) the amount of any damages received . . . on account of personal injuries. . . . "

Statutory exclusions to income must be specifically defined and are narrowly construed. *See St. Clair v. United States*, 778 F. Supp. 894, 895 (E.D.Va. 1991). O'Gilvie contends the reasoning of *United States v. Burke*, 119 L. Ed. 2d 34 (1992), indicates that where the source of the underlying claim is for personal injury, as it is in this case, any award "on account of" that personal injury is excludable from gross income. O'Gilvie argues the "additional amount" award falls within the exclusion.

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[2] Interest is merely one of fifteen listed examples of what constitutes income. The statute expressly recognizes that income is not limited to those fifteen items.

The government relies on *Kovacs v. Commissioner, supra,* and argues that § 104(a)(2) has no application to this case. In *Kovacs,* the taxpayers recovered damages in the amount of $995,000 in a wrongful death action. After exhausting its appeals, the defendant paid the taxpayers $2,254,741.70, the sum of the damages, and $1,253,607.17 in statutory interest. The taxpayers did not report any part of the amounts received on their 1987 federal income tax returns, and the government determined that the taxpayers should have included the interest portion of the award in gross income. The taxpayers filed a petition in Tax Court.

The taxpayers argued the term "damages" under § 104(a)(2) was broad enough to include interest on such damages. The court found a consistent line of authority had rejected the taxpayers' argument. It noted that Congress had reenacted the exclusion numerous times and continued to exclude only "damages" and omit any mention of "interest." The court found Congress' actions implied a continuing acceptance of the existing interpretation of the exclusion. Accordingly, the court held the statutory interest received by the taxpayers was not excludable under § 104(a)(2).

The court agrees with the Tax Court's analysis. *United States v. Burke* does not hold to the contrary. *Burke* does not address the treatment of statutory interest under § 104(a)(2). *Burke* decided whether payments received in settlement of a backpay claim under Title VII are excludable from gross income. The Court held they did not. 119 L. Ed. 2d at 47. *Burke* provides no support for O'Gilvie's position.

The court holds that the "additional amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

IT IS SO ORDERED.

At Wichita, Kansas, this 30th day of November, 1993.

/s/ Monti L. Belot
Monti L. Belot
United States
District Judge

UNITED STATES DISTRICT COURT

_____ DISTRICT OF KANSAS

KELLY M. O'GILVIE

JUDGMENT IN A CIVIL CASE

v.

(Filed Nov. 30, 1993)

UNITED STATES OF AMERICA

CASE NUMBER: 90-1075-MLB

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant, United States of America, is granted and the Court holds that the "additional amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

November 30, 1993
Date

RALPH L. DeLOACH
Clerk

Entered on Docket
11/30/93

/s/ B. Hatchett
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

KELLY M. O'GILVIE

v.

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CIVIL CASE

(Filed Dec. 7, 1993)

CASE NUMBER: 90-1075

_ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order filed and docketed on the 26th day of August, 1992, the motion for reconsideration filed by the plaintiff is granted and his motion for summary judgment is also granted; IT IS FURTHER ORDERED that pursuant to the Memorandum and Order filed and docketed on the 30th day of November, 1993, the motion for summary judgment filed by the defendant is granted and the Court holds that the "additional Amount" on $8.65 million from the date of the district court's entry of remittitur to the district court's entry of judgment in accordance with the Tenth Circuit's mandate was interest and is taxable as income.

December 7, 1993
Date

RALPH L. DeLOACH
Clerk

Entered on Docket 12/7/93

/s/ B. Hatchett
(By) Deputy Clerk

§ 104. Compensation for injuries or sickness

(a) **In general.** – Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer);

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 808 of the Foreign Service Act of 1980; and

(5) amounts received by an individual as disability income attributable to injuries incurred as a direct result of a violent attack which the Secretary of State determines to be a terrorist attack and which occurred while such individual was an employee of the United States

engaged in the performance of his official duties outside the United States.

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c)(1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee. Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

Internal Revenue Code

SEC. 7806. CONSTRUCTION OF TITLE.

[Sec. 7806(a)]

(a) CROSS REFERENCES. – The cross references in this title to other portions of the title, or other provisions of law, where the word "see" is used, are made only for convenience, and shall be given no legal effect.

[Sec. 7806(b)]

(b) ARRANGEMENT AND CLASSIFICATION. – No inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or

grouping of any particular section or provision or portion of this title, nor shall any table of contents, table of cross references, or similar outline, analysis, or descriptive matter relating to the contents of this title be given any legal effect. The preceding sentence also applies to the sidenotes and ancillary tables contained in the various prints of this Act before its enactment into law.

RULES OF CIVIL PROCEDURE

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.

Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

(Amended March 19, 1948; Aug. 1, 1983; Aug. 1, 1985; Dec. 1, 1991; Dec. 1, 1993.)

Rule 59. New Trials; Amendment of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the

matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

(Amended Mar. 19, 1948; July 1, 1966.)

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial

under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug 1, 1987.)

SUMMARY OF CASES

YEAR	CASE	COURT	NATURE OF UNDERLYING CLAIM	TYPE OF DAMAGES[1]	"UNDERLYING CLAIM" TEST	FINDING	COMPENSATORY PURPOSE TEST	FINDING	AMBIGUOUS/ PLAIN
1927	Hawkins 6 BTA 1023	B.T.A.	Libel and Slander 213(b)(6)	Damages	Not Mentioned		———		
1961	Agar 290 F.2d 283	2nd Cir.	Claim Severance Pay and Extra Compensation only	Severance Pay and Extra Compensation	Adopted p. 284	NO TORT CLAIM			
1962	Starrels 304 F.2d 577	5th Cir.	Consent to potential invasion of personal rights	Payment for Consent to Portray Father's Life	Adopted	NO TORT CLAIM	Dicta compensatory purpose		
1965	Knuckels 349 F.2d 610	10th Cir.	1) Contract Damages 2) Damages to Business	Lost Earnings, Business Losses; Contract Losses	Adopted	NO TORT CLAIM			
1972	Seay 58 TC 32	Tax Court	1) Wrongful discharge 2) Personal reputation	Damages in settlement for personal injury	Adopted p. 37	TORT CLAIM	Rejected pp. 37, 40		
1975	**Rev. Rule 75-45, 1975-1 C.B. 47**	**IRS**	Wrongful Death	Punitive Damages	Adopted	TORT CLAIM	Not Discussed		PLAIN
1975	Hodge 64 TC 616	Tax Court	Sexual Discrimination-Title VII	Back pay	Adopted	NO TORT CLAIM	———		
1981	Glynn 76 TC 116	Tax Court	Damaged personal reputation	Back pay Severance Pay	Adopted p. 119	NO TORT CLAIM	———		PLAIN p. 148
1981	Wolfson 651 F.2d 1228	6th Cir.	Libel	Lost Earnings, Damages to personal reputation	Adopted	TORT CLAIM	Not Discussed	———	———
1983	Church 80 TC 1104	Tax Court	Defamation	Punitive Damages	Adopted pp. 1110, 1106	TORT CLAIM	Rejected	———	———
1983	Roemer 716 F.2d 693	9th Cir.	Libel Defamation	Lost Income Punitive Damages	Adopted p. 700	TORT CLAIM	Rejected p. 699	———	———
1984	**Rev. Rule 84-108, 1984-2 C.B. 32**	**IRS**	Wrongful Death	Punitive Damages	Rejected	TORT CLAIM	Adopted	Punitive damages are not compensatory	No Analysis
1985	Rev. Rule 85-143, 1985-2, C.B. 55 (Rejected by Threlkeld)	IRS	Defamation	Loss of Professional Reputation	Rejected	TORT CLAIM	Adopted	———	No Analysis
1985	Burford 86-2 USTC ¶85,764	D.C. Ala.	Wrongful Death	Punitive Damages	Adopted p. 85,766	TORT CLAIM	Rejected p. 85,766	———	PLAIN p. 85,766
1986	Threlkeld 87 TC 76	Tax Court	1) Malicious Prosecution 2) Professional reputation	Damages for injury to professional reputation	Adopted p. 1308	TORT CLAIM	Rejected p. 1308	———	AMBIGUOUS p. 1308
1987	Bent 835 F.2d 67	3rd Cir.	1st Amendment Right to Free Speech	Lost Wages	Adopted p. 70	TORT CLAIM	Rejected p. 70	———	
1988	Threlkeld 848 F.2d 81 Rejects Rev. Rule 85-143	6th Cir.	1) Malicious Prosecution 2) Professional reputation	Business and Wage Losses Damages for injury to professional reputation	Adopted p. 84	TORT CLAIM	Rejected p. 84	———	Followed 3rd and 9th Cir. Rejected Rev. Rul. 85-143

[1] The excludability of these types of damages is contested by the IRS, other types of damages may have been awarded.

YEAR	CASE	COURT	NATURE OF UNDERLYING CLAIM	TYPE OF DAMAGES	"UNDERLYING CLAIM" TEST	FINDING	COMPENSATORY PURPOSE TEST	FINDING	AMBIGUOUS/PLAIN
1988	Metzger 88 TC 46	Tax Court	1) Breach of Contract 2) Discrimination	Lost Earnings	Adopted p. 847	TORT CLAIM	Rejected p. 847	_____	AMBIGUOUS TREAS. REG.
1988	Byrne 90 TC 1000	Tax Court	1) Fair Labor Standards Act 2) Wrongful Discharge	Allocation between tort and contract claim	Adopted		Rejected	_____	
1989	Wulf 883 F.2d 842	10th Cir.	Civil Rights Action	Front pay, Back pay, Lost benefits, Emotional Distress Damages, Punitive Damages	Adopted p. 873	TORT CLAIM	Rejected	_____	
1989	Thompson 866 F.2d 709	4th Cir.	1) Equal Pay Act 2) Contract Claim for Back pay	Back pay, Liquidated Damages	Adopted p. 711	TORT - Liquidated NO TORT-Contract	Rejected	_____	
1989	Byrne 883 F.2d 211	3rd Cir.	1) Fair Labor Standards Act 2) Wrongful Discharge	Allocation between tort and contract claim	Adopted p. 214	TORT CLAIM	Rejected p. 214	_____	
1989	Miller 93 TC 330	Tax Court	1) Defamation 2) Intentional infliction of emotional distress	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	PLAIN p. 338
1990	Rickel 900 F.2d 655	3rd Cir.	Age Discrimination	Lost Wages	Adopted p. 659	TORT CLAIM	Rejected p. 659	_____	
1990	Miller 914 F.2d 586 Reversing TC	4th Cir.	Defamation and libel	Punitive Damages	Rejected pp. 589, 591	TORT CLAIM	Adopted p. 591	Punitive damages are not compensatory	AMBIGUOUS
1990	Pistillo 912 F.2d 145	6th Cir.	Age Discrimination	Lost Wages	Adopted p. 148	TORT CLAIM	Rejected p. 148	_____	PLAIN
1991	Redfield 940 F.2d 542	9th Cir.	Age Discrimination	Economic Losses	Adopted p. 545	TORT CLAIM	Rejected	_____	
1991	Kemp 91-2 USTC ¶50,329	N.D. Ga.	Constitutional Rights Violation	Punitive Damages	Rejected p. 89,138	TORT CLAIM	Adopted p. 89,138	Punitive damages are not compensatory	AMBIGUOUS
1991	Downey 97 TC 10	Tax Court	Age Discrimination	Nonliquidated Damages Liquidated	Adopted pp. 4398-4399	TORT CLAIM	Rejected pp. 4398, 4399	_____	AMBIGUOUS
1991	Burke 929 F.2d 1119	6th Cir.	Sexual Discrimination-Title VII	Back pay	Adopted p. 1121	TORT CLAIM	Rejected p. 1121	_____	THRELKELD
1992	O'Gilvie 92-2 USTC ¶50,567	D.C. Kan.	Wrongful Death	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	FOLLOWED BURKE, U.S.
1992	**Burke 112 S.Ct. 1867**	**S.Ct.**	Sexual Discrimination-Title VII	Back pay	Adopted	NO TORT CLAIM	Rejected pp. 1869, 1872	_____	AMBIGUOUS p. 1870

YEAR	CASE	COURT	NATURE OF UNDERLYING CLAIM	TYPE OF DAMAGES	"UNDERLYING CLAIM" TEST	FINDING	COMPENSATORY PURPOSE TEST	FINDING	AMBIGUOUS/ PLAIN
1993	Hawkins 93-1 USTC ¶50,208	D.C. Ariz.	Breach of Good Faith, Fair Dealing	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	_____
1993	Horton 100 TC No. 8 Dec. 48,856	Tax Court	Physical Damage to Residence	Punitive Damages	Adopted p. 3967	TORT CLAIM	Rejected p. 3967	_____	PLAIN p. 3967
1993	Reese 94-1 USTC ¶50,232	Federal Claims	1) Sexual Discrimination 2) Sexual Harrassment	Punitive Damages	Rejected p. 50,448	TORT CLAIM	Adopted p. 50,448	Punitive damages are not compensatory	PLAIN
1993	Rice 834 F.Supp. 1241	E.D. Cal.	Age Discrimination	Liquidated Damages; Punitive Damages	Adopted	TORT CLAIM	Adopted	Liquidated and punitive damages not compensatory	No Analysis
1994	Hawkins 30 F.3d 1077	9th Cir.	Breach of Good Faith, Fair Dealing	Punitive Damages	Rejected	TORT CLAIM	Adopted	Punitive damages not compensatory	AMBIGUOUS
1994	Hawkins 30 F.3d 1077 J. Trott *Dissenting*	9th Cir.	Breach of Good Faith, Fair Dealing	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	PLAIN
1994	Horton 33 F.3d 625	6th Cir.	Physical Damage to Residence	Punitive Damages	Adopted p. 630	TORT CLAIM	Rejected p. 630	_____	PLAIN p. 631
1994	Wesson 94-1 USTC ¶50,139	D.C. Miss.	Insurance Fraud Claim	Punitive Damages	Adopted	NO TORT CLAIM	Adopted in dicta	_____	AMBIGUOUS
1994	McKay 102 TC 16	Tax Court	1) Wrongful Discharge 2) Breach of Contract	Wrongful discharge damages	Adopted p. 78,659	TORT CLAIM	Rejected p. 78,659	_____	
1994	Bennett 94-1 USTC ¶50,044	Federal Claims	Age Discrimination	Liquidated Damages Back pay	Adopted p. 83,177	TORT CLAIM	Dicta p. 83,179		
1994	Reese 24 F.3d 228	Fed. Cir.	1) Sexual Discrimination 2) Sexual Harrassment	Punitive Damages	Rejected p. 234		Adopted p. 231	Punitive damages are not compensatory	AMBIGUOUS, p. 230
199__	Robinson ____ TC ____	Tax Court	Wrongful failure to release lien	Punitive Damages	Adopted	TORT CLAIM	Rejected	_____	
1995	Wesson 48 F.3d 894	5th Cir	Insurance Fraud Claim	Punitive Damages	Adopted p. 897	TORT CLAIM	Adopted p. 898	Punitive damages not compensatory p. 900	AMBIGUOUS P. 897
1995	Schleier 95-1 USTC ¶50,309	S.Ct.	Age Discrimination	Liquidated damages	Adopted p. 88,117	NO TORT p. 88,117	Adopted p. 88,117	Liquidated damages are not compensatory	PLAIN p. 88,115-88,116
1995	O'Gilvie 95-2 USTC ¶50,508	10th Cir.	Wrongful Death	Punitive Damages		TORT CLAIM	Adopted	Punitive damages are not compensatory	AMBIGUOUS p. 89,639
1995	Robinson 1995 U.S. App. Lexis 33,759	5th Cir	Wrongful Failure to Release Lien	Punitive Damages	Rejected	TORT CLAIM	Adopted	Follows Wesson	AMBIGUOUS

STATUTORY AND REGULATORY PROVISIONS

Section 61(a) of the Internal Revenue Code of 1986, 26 U.S.C. §61(a), provides:

Except as otherwise provided in this subtitle, gross income means all income from whatever source derived.

Revenue Act of 1918 Section 213(b)(6) provides:

> Amounts received through accident or health insurance or under workman's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness.

Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. §104(a), provides:

> (a) **In General**. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –
>
> (2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.

The 1989 Amendment to §104(a)(2) of the Internal Revenue Code, 26 U.S.C. §104(a) adds:

> Paragraph (2) shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness.

Section 1.104-1(c) of the Treasury Regulations, 26 C.F.R. §1.104-1(c), provides:

> Section 104(a)(2) [of the Internal Revenue Code] excludes from gross income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. The term "damages received" (whether by suit or agreement) means an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.